

THE
PRACTICE OF THE LAW
IN
ALL ITS DEPARTMENTS;
WITH A VIEW OF
RIGHTS, INJURIES, AND REMEDIES,
AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;
SHOWING
THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;
AND
THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES;
OR TO ENFORCE SPECIFIC RELIEF, PERFORMANCE, OR COMPENSATION:

AND
THE PRACTICE
IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY;
PRIZE; COURT OF BANKRUPTCY; AND COURTS OF
~~ERROR AND APPEAL.~~

WITH NEW PRACTICAL FORMS.

INTENDED AS
A COURT AND CIRCUIT COMPANION.

—
IN TWO VOLUMES.

—
PART IV.

—
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P R E F A C E

TO

PART FOURTH.

I HAVE endeavoured in the following pages to give a comprehensive view of “ *The Science of Practice*,” as distinguishable from the mere routine of issuing and serving a writ, delivering or filing a declaration, &c. which may generally be conducted by a clerk of comparatively little knowledge or experience. My reason for publishing this part *separately* from that relating to *mere practice* is, that it may be found more extensively interesting and useful, not only to *all legal Practitioners*, but also to the *Public*, than the mere detail of practice; and that consequently many may wish to possess it as a *separate work*, without being incumbered with the latter. Every Barrister, Pleader, Solicitor, Attorney or Proctor, whatever department of the Law he may pursue, is, or ought to be, anxious to *combine* so much knowledge of the jurisdiction and course of Practice of *all the Fourteen principal Courts of Justice*, and to be so accustomed to *compare them* as regards their utility, as to enable him *promptly* to advise his client which *remedy* is, under the circumstances of his case, *preferable*; whilst at present too frequently a *Common Law* Barrister or Attorney recommends a remedy in the Court where he practises, and the *Chancery* Barrister, or Solicitor, prefers a Court of Equity; and the Doctors and Proctors naturally think most favourably of their own Courts, although there are con-

stantly better remedies elsewhere. And addressing myself to the *Public*, or at least to those *private individuals* who have property or rights to protect or defend, I assure them that very frequently success in a suit or proceeding depends on a *client* being able somewhat to *judge for himself*, though he should not absurdly do more than *suggest*, and rarely interfere after the particular remedy has been decided upon. All understand and admit the force of the well known maxim, that after attaining a certain age, every man is either "a fool or his own Physician," and every experienced Physician knows that frequently the Patient suggests to him a remedy or a regimen which he finds it expedient to adopt. So in Law, if *Private Gentlemen* would inform themselves of the Outline of *Remedies* and the *Principles of Practice*, they would frequently secure a welcome result, which might otherwise be endangered; and I therefore invite their attention at least to so much of the following pages as may be applicable to their situation.

Be this, however, as it may, forty years' experience has taught me how narrow and limited are my own legal attainments, and to induce me to think that many legal Practitioners are very frequently called upon to advise upon branches of Law, with which they are too little informed to enable them scarcely with integrity or propriety to advise upon the case, and still less upon the practical remedy. Many years ago, therefore, I resolved, as well for my own assistance as for the use of my pupils, to collect all the principles and rules which govern the practice of every Court, at least in the United Kingdom, and the following pages relative to those of *general jurisdiction* are the result of that labour, rendered more difficult by the recent alterations in the Law, all of which are

incorporated, and which have caused even the admirable work of Sir William Blackstone (hitherto the *vade mecum* of Legislators and Private Gentlemen,) and many other excellent treatises, to be almost *obsolete* and in practice even *dangerous* to follow.

When examining in distinct sections separately the particulars of the jurisdiction of each of the *fourteen* principal Courts, whether exclusive or concurrent, it will be found that there are suggestions and full directions, not only when a particular remedy can be pursued *only* in one particular Court, but also when one of several Courts, having *concurrent* jurisdiction, is to be *preferred*, and *why*. The leading distinctions and peculiar advantages arising, under varying circumstances, from proceeding either at *Law* or in *Equity*, or in the *Ecclesiastical* or *Admiralty* Courts, or by adopting a *summary* in lieu of a *formal*, dilatory and expensive remedy, are constantly explained. A full examination into these is of the utmost importance, and constitutes what may be termed the science of Law, instead of the mere practice. (a) One or two instances of several thousand, hitherto but little known, may suffice to illustrate; thus, *contribution* amongst sureties *may* in general be enforced as well in Courts of Law as in Equity; but in some cases the remedy is more extensive in Equity than at Law; (b) and a *small legacy* may be recovered in an Ecclesiastical Court in a very short time, and comparatively free of expense, when it would be absurdly ruinous to attempt to proceed in a Court of Equity. (c) So if there has been a collision of ships at sea, and greater damage thereby occasioned to one than to the other, in consequence of

(a) *Post*, 302, 303, note (g).

(b) *Post*, 303, note (h).

(c) *Post*, 498, 499.

the bad management of both the ships, equally or at least both in a degree to blame, an action at law would in such case fail, (d) but in the Court of Admiralty an equitable contribution by the owner of the ship least damaged could be enforced. (e) So several sailors may, in the Court of Admiralty, join in a suit for their separate wages, although due on distinct contracts, and may in such suit arrest the ship to secure the payment, though at law each must have sued separately, and could not have such security. (f) These and innumerable other important distinctions, as well in jurisdiction as in practice, will be found collected in the following pages.

Sect. 1, Jurisdiction and practice of all the Courts.

Sect. 2, Jurisdiction and practice of the three Courts of Law and which preferable.

The first section gives an outline of the *jurisdiction* and *general course of practice* in all the Courts. The second examines the jurisdiction and practice of the *three Courts of Law* at Westminster, viz., the King's Bench, Common Pleas and Exchequer of Pleas, and shews that in general in these and most other Courts the remedy is either *formal* or *summary*, and states the original and present distinct provinces of each of these Courts, and concludes with an enumeration of the several principal circumstances, which may either in general or in particular cases induce a preference of one Court to another; such as, *first*, the general competency and ability of the Court to be preferred: *secondly*, the supposed opinion or inclination of its Judges on particular points of Law, or even ethics: *thirdly*, the distinction in practice of each Common Law Court, as one being more favourable to an Attorney's lien than the others: *fourthly*, the arrears of other suits and pro-

(d) *Vernal v. Gardner*, 3 Tyr. R. 85, post, 515.

(e) *Post*, 514.

(f) *Post*, 520.

bability of dispatch in one Court or delay in another; *fifthly*, the peculiar talent of particular Counsel acting in each Court, and the certainty of their attendance in the important stages of the cause. (g)

The *third* section is devoted to the full investigation of the distinct jurisdiction and practice of the Court of *King's Bench*. (h) First, *That over civil matters*, as first, in *formal actions*, whether personal, real or mixed: secondly, in *Summary* proceedings, as by Habeas Corpus, on Awards, Annuities, Mortgage Deeds, Bail and Replevin Bonds, or respecting Warrants of Attorney, Officers of the Court, Sheriffs and Bailiffs, Attornies and Articled Clerks, and Costs of Election Petitions: thirdly, in proceedings in furtherance of the Court's *own jurisdiction*, as at Common Law, in protection of Sheriffs, or under the Interpleader Act, and upon interrogatories and commissions for examining Witnesses; and of the inability of this Court to compel a discovery: fourthly, proceedings in aid of the Civil jurisdiction of *other Courts*, or in compelling them to act, or restraining them from acting, or on appeal from their decisions; and herein of the Court's delivering its opinion on cases from Courts of Equity, and trying Issues, and of enforcing judgments of Inferior Courts, and of Writs of Mandamus and Prohibition; and lastly, of the Court's jurisdiction as a Court of Error or Appeal from Inferior Courts or Tribunals, as well formal on Writs of Error and Certiorari, as summarily upon the decision of Justices, in cases between Landlord and Tenant, and in other cases. *Secondly*, its jurisdiction over *Criminal and Public matters*, as regards Indictments and Criminal Informations, Articles of the

Sect. 3, Jurisdiction and practice of the Court of King's Bench.

(g) *Post*, 320 to 324.

(h) *Post*, 324 to 382.

Peace, Informations in nature of *Quo Warranto*, and the Criminal Jurisdiction, as a Court of Error and Appeal in Criminal cases, either formal upon a Writ of Error, or summary upon *Certiorari*, removing Convictions, Coroners' Inquests, and cases stated at Sessions relative to Poor Rates and other Assessments, and Orders of Removal, and proceedings before Commissioners of Sewers. The author anxiously hopes that this section, compressed in less than sixty pages, may be found useful to *Junior Barristers*, as containing an outline of all the subjects upon which their future practice in the Court of King's Bench will be founded.

Sect. 4, Court
of Common
Pleas.

The *fourth* section relates to the Court of *Common Pleas*, shewing its *coextensive jurisdiction* over all *Personal Actions*, and its *exclusive jurisdiction* over *Real Actions*, and in *quare impedit* at the suit of the subject, and over Fines and Recoveries. It is then concisely submitted, that in respect of the excellent Constitution of this Court, and the great learning of its Judges and of the Serjeants, a considerable part of its former *exclusive jurisdiction* ought to be restored, so as to establish a more perfect and uniform system of Law, at least as respects *Real property*, than at present exists. The jurisdiction of this Court is also practically considered as regards Habeas Corpus, Awards, Annuities, Mortgages, Attornies and Officers of this Court, and in Prohibition, &c. together with its jurisdiction as a Court of Appeal; but without having any direct cognizance of crimes.

Sect. 5, Court
of Exchequer of
Pleas.

The *fifth* section states the very various subjects of the jurisdiction of the Court of *Exchequer of Pleas*, originally constituted only for Revenue purposes, but now having jurisdiction concurrent with the King's

Bench and Common Pleas, over all *Personal* actions, but limited like the King's Bench as regards real and mixed actions. The cases in which this Court has *exclusive* jurisdiction are also enumerated, especially as regards proceedings on recognizances of a public nature, and for enforcing payment of fines imposed by other Courts, or the payment of Legacy Duties or Taxes, or duties of Customs or Excise, the jurisdiction and practice on Extents in Chief or in Aid, on informations on Seizures under the Laws of Customs and Excise; and the jurisdiction and practice on Petitions of Right, &c. between the King and the Subject, and the Crown practice in the Exchequer, although it has no direct criminal jurisdiction. Some of the subjects of this section, although of great practical importance, have not before been published; and hence the difficulties which Barristers and Solicitors practising in general in other Courts have frequently experienced.

The *sixth* section contains a practical inquiry into the particulars of the jurisdiction of the *Chancellor and Court of Chancery*; and, knowing by personal experience the usual defects in the information of Barristers and Attornies who generally practise in the *Common Law Courts*, and the consequent inconveniences, if not embarrassment, they have to surmount, I have endeavoured to assist in removing those difficulties. Of course the principal distinctions between *Legal* and *Equitable* rights, injuries and remedies are explained, and the *four* distinct subjects of the jurisdiction of the Chancellor have been stated; and as regards his principal *Equitable* jurisdiction in *Chancery*, the cases of Accident and Mistake, Accounts, Frauds, Interests of Infants, Specific Performance of Agreements, and cases of Trust are examined; and it is

Sect. 6, Of
Chancellor and
Court of Chan-
cery.

shewn when it is preferable to proceed in Chancery or when at Law. The course of proceeding, whether formal by Bill and Answer, Hearing and Decree; or more summarily by Motion, and the peculiar and admirable remedies by *Injunction* to prevent injuries, or by bill and decree of *Specific Performance* of contracts, enforcing the specific enjoyment of a right, are fully considered, and these within the space of *forty* pages.

Sect. 7 & 8,
Courts of Mas-
ter of the Rolls
and Vice-Chan-
cellor.

In the *seventh* and *eighth* sections, the distinct jurisdiction and practice before the *Master of the Rolls*; and also before the *Vice-Chancellor* in aid of the Chancellor, and as in effect branch jurisdictions subordinate to, though in some respects independent of that Tribunal, are practically stated.

Sect. 9, Equity
side of Exche-
quer.

The jurisdiction and practice on the *Equity side of the Court of Exchequer* form the subjects of inquiry in the *ninth* section; the particular advantage of filing an Injunction Bill in that Court, in preference to Chancery, is noticed.

Sect. 10, Of
Ecclesiastical
Courts.

Having in the earlier stages of my professional studies and practice experienced most disheartening difficulties from the want of adequate knowledge of the jurisdiction and course of proceedings in the *Ecclesiastical* and *Admiralty* Courts, I have analyzed and arranged the results of the modern Reports of decisions in those Courts. These affect very extensive and interesting branches of litigation, and afford redress or punishment for many either private or public injuries. The *private* suits may be arranged under *five* heads, as 1st, *Pecuniary causes*, for the recovery of Ecclesiastical

debts, duties or demands, as claims for Tithes; (k) Ecclesiastical dues and Ecclesiastical waste, called spoliation, being either wilful or permissive waste, as dilapidations in parsonage houses, &c. 2ndly, *Matrimonial causes*, and including suits either for jactitation, in other words malicious pretence of marriage; also, nullity of marriage on the ground that it was originally void, on various grounds; as incestuous, or having been between persons too nearly related, or obtained by force or fraud, or on account of pre-existing impotence, or marriage under wilfully false names, contrary to the Marriage Act; also suits for restitution of conjugal rights; suits for *divorces* on account of *adultery* or *cruelty*, or some infamous propensity; and collateral suits for *alimony*; (l) most of which causes are unhappily of very frequent occurrence, and the particulars of which necessarily interest many members of the community. 3rdly, *Testamentary causes*, relating either to the validity of wills, or the grant of letters of administration, (m) or to the distribution of assets by the payment of debts or legacies; (n) or distribution of a residue unappropriated by a will; and these include all that relates to *caveats* to prevent the grant of probate or of letters of administration, and applications and suits to obtain the same, or compelling sureties in an administration bond to justify, or swear that they are worth the penalty of the bond, and also comprise suits in the Ecclesiastical Courts for the recovery of a legacy, (and which in ordinary cases seem preferable to a suit in equity,) and also to obtaining per-

(k) *Post*, 456, 457; and see form of citation and libel, *post*, 490, 491, note (x).

(l) See fully, *post*, 458 to 464, 484, 487, 490, 498, note (h).

(m) *Post*, 464 to 468, 500 to 507, and forms in notes.

(n) As to legacies in particular, see the summary remedy, *post*, 466, 467, and particularly 498 to 500.

mission to proceed on the administration bond, &c. 4thly, are suits for *Spiritual Defamation*, or the *verbal imputation* of the guilt of some offence punishable only in an Ecclesiastical Court, and which, as now conducted and enforced, in protection of character, seems admirably constituted to punish a malicious slanderer, and afford some atonement to a defamed party, more effectually than the Common Law action for slander. (q) And 5thly, Suits for *disturbance of Pews or Seats in Churches*, or the right of *burial*. The *second* branch of Ecclesiastical jurisdiction relates to proceedings of a *Public nature*, as against Churchwardens for non-observance of their duty, and relating to Church Rates, and especially suits for subtraction of a sum duly assessed; (p) offences by Ministers, as refusing to marry, christen or bury; or offences for which they may be deprived or otherwise punished; and for other Ecclesiastical offences, as striking or brawling in a Church or Church Yard; adultery, fornication, lewdness, drunkenness and solicitation of chastity, each of which are cognizable in those Courts; the last exclusively so. The proceedings in these suits are stated, and the best approved *forms* applicable to the same are given in the notes.

Sect. 11, Court of Admiralty.

As regards the Court of Admiralty, (the subject of the *eleventh* Section,) the proceedings are either for compensation for torts, or to enforce contracts express or implied. The former for a Sea Battery, (q) Collision of Ships, (r) tortious possession of Ships, (s) or the restitution of Goods taken piratically or illegally, and

(o) *Post*, 467 to 472, 486.

(p) *Post*, 47 to 475, 491, 492.

(q) *Post*, 512, -and see form of warrant to arrest master, 535, in

note.

(r) *Post*, 513.

(s) *Post*, 516.

not as Prize. (t) And in connection with contracts, are Suits between Part-owners of Ships, as to obtain security on a ship's being sent on a voyage without consent; (u) or for Mariner's Wages, (x) or for Pilotage, (y) or on Bottomry Bonds, (z) or relating to Salvage (a) or Wreck. (b) The distinctions between the jurisdiction of the Admiralty Court and the Prize Court are also enumerated. When it is considered that the reports alluded to are the decisions of such distinguished Judges as Lord Stowell, Sir John Nicholl, Sir Christopher Robinson, and Dr. Lushington, &c., it will be anticipated that they are of the highest value. Some forms of proceedings in this Court are stated in the notes as calculated to illustrate the context.

With the view of assuring myself that I have collected a correct account of the jurisdiction and present practice of the Ecclesiastical and Admiralty Courts, I have myself as it were become a student and pupil in those departments, and resorted to the various offices for information and for forms, and I have, with the liberal and able assistance of some of the eminent Practitioners in those Courts, been enabled to state their usual proceedings, at present too little known to Common Law and Equity Practitioners, (c) who consequently frequently adopt remedies in the Courts, where they practise, when they might have proceeded with much more advantage to their Clients in an Ecclesiastical Court, or in that of Admiralty. I have

Sources of information relative to the Ecclesiastical Courts and Admiralty Courts,

(t) *Post*, 517.

(u) *Id.*

(x) *Post*, 520; and see form, of affidavit and warrant to arrest ship, and of libel for wages, &c. 533, note (g).

(y) *Post*, 526.

(z) *Id.*

(a) *Post*, 528.

(b) *Post*, 531.

(c) See in particular the observation of Dr. Haggard in *Cassel v. Roberts*, 3 Hagg. Ec. Ca. 161, note (g), and *post*, 499.

been assured by the most eminent Proctors, that very frequently they experience the greatest difficulties in endeavouring to avoid fatal mistakes in their proceedings, in consequence of attornies and solicitors, in other respects skilful, being utterly ignorant even of the most ordinary proceedings in the Ecclesiastical and Admiralty Courts, and they consider that a recurrence of such consequences may be avoided by the publication of a work, giving an outline of such proceedings; and I am induced to hope that a perusal of the Sections X. and XI., being from pages 454 to 540, will enable even *suitors* themselves to anticipate and avoid any future difficulty.

Sect. 12, The
Prize Court.

The *twelfth* section concisely states the jurisdiction of the *Prize Court* as distinguishable from the Admiralty.

Sect. 13, The
Courts of Bank-
ruptcy.

In the *thirteenth* section will be found a summary of the *present* practice in *Bankruptcy*, as altered by 1 & 2 W. 4, c. 56, and subsequent act and rules thereon, which created and regulate "*The Court of Bankruptcy*," comprizing under that term the Court of each of the Six London Commissioners; the two Subdivision Courts, each before three of such Commissioners; and the *Court of Review*, with its four, or at present only three Judges, (having power to try disputed facts by a jury,) with an *appeal* to the *Chancellor*, and from him or sometimes direct from the Court of Review to the *House of Lords*. A practical analysis of these recent acts and rules; and a statement of the usual course of proceeding may not be unacceptable even to those who may not practise in either Court; and a creditor of a bankrupt will in this section find his course of proceeding, either to obtain a fiat or to prove a debt, fully described.

Every Practitioner has experienced considerable difficulty in stating or pursuing the practice in *Error* and upon *Appeals*, the former from *judgments* of Courts of *Law*, the latter usually from *decrees* and proceedings of a Court of *Equity*, or of an Equitable nature, and therefore the *fourteenth* section contains a compact examination of the jurisdiction of the Courts of Error and Appeal; first, of the Exchequer Chamber: secondly, of the Privy Council, and the Judicial Committee thereof: and, thirdly, of the House of Lords, whether on Writs of Error or Appeal from Courts of Law or Equity in England, Scotland or Ireland.

Sect. 14, The Courts of Error and Appeal.
1. Exchequer Chamber.
2. Judicial Committee of Privy Council.
3. House of Lords.

I repeat that I consider these subjects constitute what may be properly dignified with the appellation of “*The Science of Practice*,” important to be known to all Private Gentlemen as well as Lawyers, so as to enable them to secure *the best remedy* in almost every possible case that can arise. The rest of the Practice (to be considered in the concluding part) relates to the *Writ, Declaration, Pleadings* thereon, *Evidence, Brief, Trial, Judgment* and *Execution* at Law; and in *Equity*, to the Bill, Subpœna to answer, the Answer, Affidavits, Motions, Hearing, Decree, and Proceedings to enforce the same; and the full Practice in all the other Courts; which, though of considerable interest to every *professional* person concerned, are nevertheless of less real importance, at least to the community at large. That part, with a practical detail, and improved forms, will be published immediately the result of the bill for modifying the law of arrest has been ascertained.

J. CHITTY.

Chambers, 6, Chancery Lane,
10th October, 1834,

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PART IV. VOL. II.

CHAPTER V.

OF THE JURISDICTIONS OF THE SUPERIOR COURTS OF LAW,
EQUITY, ECCLESIASTICAL, ADMIRALTY, PRIZE, BANKRUPTCY,
AND COURTS OF ERROR OR APPEAL; AND WHICH COURT IS
PREFERABLE.

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SECT. I.—*The Jurisdiction of the Superior Courts in general.*

IN the preceding parts of this work, after giving an outline of private rights, injuries and remedies in general, we examined the modes of *preventing* or *removing* injuries by acts of parties *themselves* or of *third persons*, and by *summary* proceedings, as by *habeas corpus*, or by bill and motion for an injunction, or by *mandamus* or bill for specific performance. We have also taken a concise view of all the proceedings respecting the re-

SECT. I.
Of the jurisdiction of Courts in general. The division of the Superior Courts into those of Law, Equity, Ecclesiastical, Maritime, Prize or International, and Courts of Appeal and Error.

* N.B. This Fourth Part being in continuation of the Third Part, may ultimately be bound with the same, so as to form the Second Volume.

(a) At the head of this and each subsequent section, there will be printed an

analysis of its particular contents.

(b) As it would be inconvenient to wait till the sheets relating to the Court of Common Pleas and subsequent Courts have been printed, in order to insert the pages, they are here omitted.

CHAP. V.
SECT. I.

tainer of an attorney and his duties, and the steps to be taken before the commencement of an action; (a) and of the remedies by *arbitration*, (b) and by *summary proceeding before justices of the peace*. (c) We have now principally to consider *redress by proceedings in one of the Superior Courts*, whether of *Law*, or *Equity*, or *Ecclesiastical*, or *Admiralty*, or of *Prize*, or in a Court of Bankruptcy, and appeals and writs of error from each of those Courts; and it will be found that no question is of greater importance than—*in what Court should an action or proceeding be instituted, or in what Court must the defence be established?* (d)

Necessity for a knowledge of the particular jurisdiction of each Court, and a judicious choice, by a plaintiff as well as a defendant.

Every lawyer should be able promptly to answer, "The proceeding *must* be in the Court of —;" or, "you have the *option* of proceeding in the Court of — or of —, but under the circumstances of your case the Court of — will be preferable," stating the several grounds or reasons for the preference. In some cases only one Court can be resorted to, and then an error would be fatal, and the debt or remedy might by delay be entirely lost. (c) In others, although the remedy might be pursued in either of the Courts, yet in respect of some particular circumstance a due election may be exceedingly important. In many cases, although a Court of Law, or Equity, or an Ecclesiastical Court, may have *concurrent* jurisdiction, yet it will be found that a judicious choice will frequently materially influence success. Thus a married woman having a separate estate, and executing a bond or signing a bill of exchange as a security, can, during the life of her husband, only be sued by bill in a Court of *Equity* in respect of such separate property; and payment could there only be enforced out of a reasonable *proportion* of the rents and profits, and not against her person, or by *elegit*, or by sale of the estate. (f) But if after the death of her husband she promised to pay the equitable debt, in consideration of forbearance for time elapsed, then it may be preferable to proceed against her by arrest and action in a Court of Law upon such promise, in which case, after judgment, an execution might be issued against her person, or

(a) *Ante*, 46 to 72.

(b) *Ante*, 73 to 127.

(c) *Ante*, 127 to 251.

(d) There are some questions relative to the conduct of a suit of *peculiar importance*, whilst others, comparatively, are of little consequence, or at least an error or irregularity relative to them may be remedied with less serious consequence. Of the former description are the *Court* to be proceeded in, the substantial allega-

tions in the *declaration* and *subsequent* pleadings not corresponding with the facts as proved, the *evidence*, and the *brief*, and *conduct* on the trial. The others principally relate to the writ and mere *practical* proceeding, the conduct of which may in general be left to an experienced and intelligent clerk.

(e) *Ante*, vol. i. preface, p. viii. note (a); and *post*, 303, note (g).

(f) *Nantes v. Corroch*, 9 Ves. 189.

her personal or real property.(g) So if there have been three sureties in a bond for £3000, and one of them has been obliged to pay the whole debt, he could *at law* only sue one of the sureties for his *third*, viz. £1000, although the other surety had become bankrupt; but in *equity* he might compel the surety remaining solvent to contribute £1500, the *moiety* of the entire sum.(h) So as regards *defences*, which, though not available at *law*, might be perfect or preferable in *equity*, of which there are many, if the party be wrongfully sued at law he must in the first instance file his bill in equity for an injunction or other relief, instead of defending at law, excepting for time and to prevent execution; for if he should delay doing so, and suffer the action to proceed to judgment, that Court would afterwards refuse to stay the proceedings on the judgment, to enable the defendant to file a bill in equity, even on strong affidavits shewing that he had inadvertently mistaken his course in defending the action at law, and was now advised that he had a good defence on the merits in a Court of Equity; so that from the omission to advance the defence in a proper Court, and in due time, a party may be subjected to a liability which he might have avoided.(i) These few of many thousand instances sufficiently shew that the judicious choice of one of several even concurrent jurisdictions may substantially vary the result. It is therefore obvious that no subject is of greater im-

(g) *Littlefield v. Shee*, 2 B. & Adol. 811; *Lee v. Muggeridge*, 5 Taunt. 36; and *ante*, vol. i. 2d ed. preface, p. viii. note (a), where we have shewn the fatal consequence of an error in proceeding injudiciously. "Recently a common law barrister, very eminent for his legal attainments, sound opinions and great practice, advised that there was no remedy whatever against a married woman, who, having a considerable separate estate, had joined with her husband in a promissory note for £2500, for a debt of her husband, because he was of opinion that the contract of a married woman is absolutely void, and referred to a decision to that effect, viz. *Marshall v. Rutton*, 8 T. R. 545, he not knowing, or forgetting, that in *equity*, under such circumstances, payment might have been enforced out of the separate estate. (*Bullpen v. Clarke*, 17 Ves. jun. 366; *Hulme v. Tenant*, 1 Bro. P. C. 16; *Stewart v. Lord Kirkwall*, 3 Madd. R. 387; *Bingham v. Jones*, at Rolls, 1832; *Chitty on Bills*, 8th ed. 791; *Field v. Soule*, 4 Russ. R. 112.) And afterwards, a very eminent equity counsel, equally erroneously advised, in the same case, that the remedy was *only in equity*, although it appeared upon the face of the case, as then

stated, that, after the death of her husband, the wife had *promised* to pay, in consideration of forbearance, and upon which promise she might have been *arrested and sued at law*. (*Lee v. Muggeridge*, 5 Taunt. R. 36; and *Littlefield v. Shee*, 2 B. & Adolp. 811.) If the common law counsel had properly advised proceedings in equity, or if the equity counsel had advised proceedings by arrest *at law*, upon the promise, after the death of the husband, the whole debt would have been paid. But, upon this latter opinion, a bill in Chancery was filed, and so much time elapsed before decree, that a great part of the property was dissipated, and the wife escaped, with the residue, into France, and the creditor thus wholly *lost his debt*, which would have been recovered, if the proper proceedings had been adopted in the first or even second instance. This is one of the *very numerous* cases almost daily occurring, illustrative of the consequences of the want of, at least, a general knowledge of every branch of law."

(h) *Brown v. Lee*, 6 Barn. & Cres. 689, rule at law; *Peter v. Rich*, 1 Cha. Ca. 31, rule in equity.

(i) *Rex v. Peto*, 1 Young & Jerv. 169; but *Hullock*, Baron, dissentiente.

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Distinctions between legal, equitable, ecclesiastical, maritime and international rights, injuries and remedies.

portance than an intimate knowledge of the precise jurisdiction and practice of all the different Courts, and an *habitual inquiry* which is the best in reference to varying transactions is strongly recommended, as well to students as practitioners.

To determine upon the Court to be preferred, it is always necessary, upon the behalf of plaintiff, to ascertain the precise nature of the *right*, the *injury* and the *remedy*; and to protect a defendant, well to examine the nature of the defence, and whether it should be made at law or in equity. We have seen that Rights are Public or Private; that the latter relate either to the Person, or Personal or Real Property, and are either *Legal* or *Equitable*, *Ecclesiastical* or *Maritime*, *Municipal* or *International*; and that civil or private remedies are for the most part actions at law in the Temporal Courts, or suits in Equity, or proceedings in the Ecclesiastical Courts; further, that actions at law are *personal*, *real* or *mixed*, the former merely relating to *damages*, or the recovery of the person or *personal* property; the *second* for the recovery of land or other real property specifically; and the *third* partly for the recovery of *real* property, and partly for *damages* respecting it, as the action of ejectment, or *quare impedit*. *Injuries* also follow a similar arrangement, and are either public or private, criminal or civil, and affect a legal, or an equitable, or an ecclesiastical, or a maritime right, or a municipal or international question.

Reasons for the division of Courts, and appropriation of particular business to each.

It will be observed that in the original formation of all independent states, redress for every kind of crime or injury has in general been at first afforded in *one General Court*, and without much regard to precise form; but as population and the intricacy of transactions increased, it was found that by a *division* into *several* different Courts, and appropriating particular descriptions of business to each, the judges and practitioners having more time to attend to their particular departments, necessarily became better acquainted with them, and not only decided more correctly upon the substantial questions, but also framed more appropriate rules and forms of proceedings, and in the result more efficiently administered justice according to the varying nature of each case.^(k) Hence we trace, and historically know, that in *England* there was a judicious and natural division into *Criminal* and *Civil* Courts, viz. the *Criminal Courts* of Oyer and Terminer and Gaol Delivery, and Sessions of the Peace; and various other Courts having general or local jurisdiction over *crimes*, *misdeemeanors*

(k) Brac. Ab. S. c. 7; Mad. Hist. Exchequer; Spel. Glos. 33, 334; Gilb. C. P. 17; stat. 9 Hen. 3, c. 11, Magna

Charta, as to the ancient *Wittenagemote*, or General Council, or *Aula Regis*, as a general Court, and 2 Anstr. 624.

or *offences*; and the *Civil Courts*, either superior or inferior, having general or local jurisdiction over *civil matters*; as the Courts of King's Bench, Common Pleas, and Exchequer, for the decision of most civil *legal* claims; and the Courts of *Equity* (branching into the Court of Chancery, the Court of the Master of the Rolls, of the Vice-Chancellor, and the Court on the Equity side of the Exchequer), for the decision of all *equitable* claims; and the *Ecclesiastical Courts* for the decision of *spiritual offences* and *ecclesiastical rights*, and questions on the validity of *Wills* of personalty and *Matrimonial* causes, and suits for certain defamatory words attributing fornication, or other mere spiritual offence: the *Admiralty Court* for the decision of *maritime questions*; and the *Prize Court* for suits relative to captures, &c.; and numerous other inferior Courts, either *general* or *local*; and peculiar Courts of *Appeal* or *Error* from each. It will be found that in the original division of the principal Courts, it was intended that the Common Pleas should determine *all civil* causes between *private* subjects, and be what Sir Edward Coke termed the lock and key of the common law; (l) that the Exchequer should receive and enforce the *king's revenue*; and that the Court of King's Bench should retain all the jurisdiction which was not allotted to the other Courts, and particularly the superintendence over all inferior Courts, by way of appeal, prohibition and mandamus, and should have the *sole cognizance* of pleas of the crown in *criminal matters* arising in the county and during the time when such Court was holden.(m) But in many instances a degree of *concurrent jurisdiction*, especially upon collateral matters, was allowed to several Courts; for otherwise it would frequently occur that a proceeding peculiarly or mainly proper only in one Court, might be impeded by its inability to examine into some minor point, as in the case of a lost deed, where Courts of Law and Equity have concurrent jurisdiction.(n)

It will be found that in many cases the Courts have acted upon the principle that it is better that the original division of jurisdiction should be adhered to; (o) but nevertheless, modern enactments in numerous cases give equal jurisdiction to all the Courts of Law; though more properly, as regards private actions, the jurisdiction should have been vested in the Court of Common Pleas exclusively.

(l) 4 Inst. 99; Bac. Ab. Court of Common Pleas.

(m) See particularly Bac. Ab. Courts; Gilb. Hist. C. P. 2, 3.

(n) *Ante*, vol. i. 711. And see other cases of concurrent jurisdiction of Courts of Law and Equity, *Kemp v. Prior*, 7 Ves.

249, *post*; and Courts of Equity and Ecclesiastical Courts, *ante*, 112; and *post*, Ecclesiastical Courts.

(o) *Wells v. Pickman*, 7 T. R. 117; *Grignon v. Grignon*, 1 Hag. Ec. R. 515, 1 Anstr. 7.

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Each of these Courts adopted from the civil law, or framed *de novo*, a particular description of proceeding and practice, supposed to be best adapted to enforce its particular jurisdiction; (*p*) but in all it will be found that they adopted *two courses of proceeding*, the one *formal*, and the other *summary*. In the *Courts of Law* the *formal* proceeding was by writ, declaration, plea, replication and demurrer upon matter of *law*, formal argument, thereon, and judgment on demurrer; or an issue upon a matter or several matters of *fact*, the constitutional trial of which must be by *jury*, verdict for *damages*, and judgment for such damages and costs, afterwards enforced by formal writ of execution, either against the person or personal property, or by *elegit* against the personalty and land; and the *summary*, by affidavit, motion, rule nisi, affidavits in answer, arguments on both sides, and rule absolute or discharged; and if absolute, demand of performance, and such performance enforced by attachment for the contempt in not obeying the rule of the Court.—In *Courts of Equity* the *formal* proceeding was by bill filed, subpoena, and other process to enforce appearance; appearance, answer, depositions, hearing, formal decree; frequently for specific performance and costs, but not for damages, and enforced by attachment against the person, and by imprisonment; but not by any execution against the personal or real property of the defendant; though in a formal suit for the recovery of an equitable interest in land it is in general enforced by writ of assistance, and delivery of possession. The *summary* proceeding in Equity is by affidavit, petition or motion, contrary affidavits, hearing, and order for something to be done, and enforced by attachment.—In *Ecclesiastical Courts* the *formal* (there termed *plenary* suits) are by citation, libel, deposition, hearing, and decree usually with costs, and the performance of some specific act, as restitution of conjugal rights, public declaration of the innocence of the party defamed and prayer of forgiveness, and payment of costs, but not for damages; and enforced, not as heretofore, merely by excommunication, but by *significavit* and writ *de contumace capiendo*, and imprisonment, in effect perpetual, until obedience, under stat. 53 Geo. 3, c. 127: and the *summary proceeding*, as to obtain probate, or letters of administration, or payment of a legacy, is by petition, affidavit and summary motion, hearing and order, without any formal libel.—All these, and the pro-

(*p*) It is established that each Court has of common right power to make rules to regulate the practice of the Court, pro-

vided it do not abridge the right of the subject, or contravene any enactment. See *Mellish v. Richardson*, 9 Bing. 125.

ceedings in Courts of Admiralty and in the Prize Court, will in the course of this volume be fully considered.

At first the respective Courts adhered to their appropriate jurisdiction, but each soon attempted to extend its powers. The superior Courts, in many respects, succeeded in those attempts, but the inferior Courts were, in general, effectually restrained from any considerable invasion or increase of jurisdiction by the defendant's plea to the jurisdiction or by the writ of prohibition, hereafter noticed. Now, however, as observed by Sir John Nicholl, (q) "times are changed—a more liberal and enlightened view of questions of jurisdiction is taken,—on the one hand, the Ecclesiastical Courts have no disposition to encroach '*ampliare jurisdictionem*;' and on the other hand, Temporal Courts have no jealousy, no wish to resort to fictions and to technicalities, they look (where not bound by former decisions directly in point) to the real substance and sound sense of the question, to that which is really most beneficial to the suitors, the public and subjects of the country. There is quite as much business in all the Courts as, under the increase of wealth and population, the institutions are able to discharge." (q)

If a Superior Court of Common Law, (r) or a Court of Equity, (s) or a Criminal Court, (t) or an Ecclesiastical Court, (u) assume a jurisdiction which it clearly has not, the proceeding will in general be wholly void, and even the officer enforcing its sentence will be liable to an action; and, in general, the defendant may stay the proceeding by plea to the jurisdiction or by writ of prohibition. (x) And even where there is a local franchise to hold Courts in a particular district, the sheriff is not bound to execute there the process of a superior Court, because he might thereby be subjected to an action on the case for injuring such franchise, (y) though if he had actually arrested the defendant within the franchise the suit might have proceeded, because the superior Court has jurisdiction, subject to the interference of the owner of the franchise. (z)

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Attempts of
each Court for-
merly to extend
its jurisdiction.

Consequence of
a Court not
having jurisdic-
tion wrongfully
assuming it.

(q) *Grignon v. Grignon*, 1 Hag. Ec. Rep. 545; and see the concluding part of that case, where that excellent judge speaks with such becoming diffidence upon his knowledge respecting the rules of Courts of Equity, and alludes to the great importance of preserving the boundaries of jurisdiction as judicially designated, and admirably shews why Courts of Equity should, in certain cases, have exclusive jurisdiction. See also 2 Burn's Ecc. Law, tit. Courts, 52, 53; and per Willes, Ch. J. in *Cheesman v. Hoby*, Willes, 680.

(r) 2 Bulstr. 64; 10 Coke, 76 a.

(s) *Attorney General v. Hotham*, 3 Russ. 415.

(t) *Rea v. Haynes*, 1 Ry. & Mood. 293.

(u) *Beaurain v. Sir W. Scott*, 3 Camp. 388; *Rea v. Jenkins*, 1 B. & Cress. 655; 3 Dowl. & R. 41, S. C.; but see *Ackley v. Parkins*, 3 M. & S. 411.

(x) Bac. Abr. Prohibition, and see post fully.

(y) *Adams v. Osbaldiston*, 3 B. & Adol. 489.

(z) *Id.*; *Carrett v. Smallpage*, 9 East,

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The enumeration of the Superior Courts in general.

The Courts of Law of original jurisdiction.

The Courts of Equity.

The Ecclesiastical or Spiritual Courts, &c.

The Courts of Error from judgments of the Superior Courts of Law.

The Superior Courts, usually on account of their locality termed in statutes "*The Courts at Westminster*," are those of Law and those of Equity. Of the former (having jurisdiction principally over *legal* claims and *legal* defences, and some other peculiar matters) are—1st. The King's Bench; 2d. The Common Pleas; and 3d. The Exchequer; and the jurisdiction of these, as regards most *personal* actions, is nearly concurrent, though in respect of other actions and proceedings it is in many respects dissimilar.

The Courts of *Equity*, principally for enforcing mere *equitable* claims, or claims in some respects imperfect at law, and for giving effect to *mere equitable* defences, are the Court of Chancery, held before the Chancellor, the Court of the Master of the Rolls, the Vice-Chancellor's Court, and the equity side of the Court of Exchequer, holden before the Chief Baron, or under two modern statutes, before one other of the barons. (a) The more particular *jurisdiction* of each will be presently considered in due order, and the varying *practice* of each will form the principal subjects of this volume.

The *Ecclesiastical* Courts have jurisdiction principally over rights and injuries, private or public, of a *spiritual* or *ecclesiastical* nature; as questions upon the legality of a marriage and the propriety of divorce, and the right of a wife to alimony—questions relative to wills of personal property, probates, letters of administration, legacies and distribution of assets,—defamation imputing a spiritual offence, and not actionable or punishable at law,—and certain spiritual offences, as adultery, incest, fornication, brawling in churches, and many other offences against religion or morality. The Courts are principally the Archdeacons, Consistory, Peculiars, Arches, and Prerogative Courts. The jurisdiction of and practice in all these and other principal Courts will be fully considered.

The Court of *Exchequer Chamber* is a Court of *Error* for revising the judgments of the three Superior Courts of *Law* in matters of *law*, and is holden before the judges of the two Courts not concerned in the judgment impeached, viz. The 1 Wm. 4, c. 70, s. 8, enacts, that writs of error upon any judgment given by any of the said three Courts shall hereafter be made returnable only before the judges, or judges and barons as the case may be, of the other two Courts in the Exchequer

333; *Sparkes v. Spink*, 7 Taunt. 311; *Bell v. Jacobs*, 4 Bing. 523; but in *Rex v. Mead*, 2 Stark. R. 205, it was held not to be murder to kill a bailiff in resisting the execution of mesne process, if the

bailiff was attempting to execute a writ without a not omittas clause in an exclusive liberty.

(a) 57 Geo. 3, c. 18; 3 & 4 Wm. 4, c. 41, s. 23.

Chamber, any law or statute to the contrary notwithstanding; and that a transcript of the record only shall be annexed to the return of the writ, and the Court of Error, after errors are duly assigned and issue in error joined, shall, at such time as the judges shall appoint, either in term or vacation, review the proceedings and give judgment as they shall be advised thereon, and such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original record remains; from which judgment in error no writ of error shall be or be had, except the same be made returnable in the High Court of Parliament. So that under this statute the judges of the Court of Common Pleas, together with the barons of the Exchequer, constitute the Court of Error upon a writ of error from the judgment of the Court of King's Bench; and the judges of King's Bench, together with the barons of the Exchequer, constitute the Court of Error upon a writ of error in the judgment of Common Pleas; and the judges of King's Bench and of Common Pleas, constitute the Court of Error from a judgment of the Court of Exchequer.

The High Court of Parliament is a Court of Error not only from judgments in error of the Court of Exchequer Chamber, but also the Court of Appeal from decrees and proceedings in Chancery. The nature and extent of the jurisdiction of the House of Lords as a Court of Error will hereafter be fully considered.

The High Court of Parliament as a Court of Error from Exchequer Chamber and of appeal from Chancery.

Formerly the Court of Delegates, and from thence occasionally a Commission of Review, were the Court of Error or Appeal from the decrees and proceedings of the superior Ecclesiastical Court and the Court of Admiralty and Prize Court, and from Foreign Courts, but that jurisdiction has been repealed by 2 & 3 Wm. 4, c. 92, and the Privy Council is now constituted the Court of Appeal in such cases. And the 3 & 4 Wm. 4, c. 41, constitutes "*The Judicial Committee of the Privy Council*" the Court of Appeal from the Court of Admiralty in causes of prize, and from the decisions of various Courts of judicature in the East Indies, and in the plantations and colonies in America, and other dominions of his Majesty abroad. The jurisdiction and practice of these High Courts of Appeal will hereafter be fully considered.

The Privy Council and the Judicial Committee of the Privy Council.

The legal and equitable jurisdiction of the Courts of Bankruptcy, including that of the Court of Review, constituted by

The Courts of Bankruptcy.

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1 & 2 Wm. 4, c. 56, will be noticed towards the conclusion of this chapter.

The principal distinctions between the jurisdictions of all these several Courts.

Courts of *law*, as regards private injuries, in general only afford redress for *injuries* to *legal* rights and give effect to *legal* and not to equitable defences; whilst Courts of Equity cannot (excepting in a few cases where Courts of Law and of Equity have *concurrent* jurisdiction, and in some other cases where it acts *in aid* of a suit at law,) interfere where the right is legal, but are confined in jurisdiction to redress for injuries to *equitable* rights not recognized at law, and to *equitable* defences not available at law. On the other hand, Ecclesiastical Courts have peculiar cognizance of and jurisdiction over all *matrimonial* questions, and incidentally alimony, and over all *testamentary causes* relating to personal property, as respecting the validity and probate of wills of *personalty*, and over verbal defamation, imputing only some spiritual offence not cognizable nor punishable in the temporal Courts. But although these general rules are simple, they are in their application frequently difficult, and require full knowledge of the nature of rights, injuries and remedies, and even then much consideration in many peculiar cases.

Another important distinction at present exists between proceedings in Courts of Law and those in Equity or Ecclesiastical Courts, viz. that in the former, whenever a *debt* of £20 can be sworn to exist, the defendant may be arrested, and must remain in prison or find bail as a security for his forthcoming at the termination of the action; whilst, with the exception of a writ of *ne exeat*, to prevent a defendant leaving the kingdom, a defendant in equity or an ecclesiastical suit can only be served with process or cited and merely required to enter his appearance, and the complainant has no security, in case he should leave the country, and the decree is in general only *in personam* by attachment for the contempt in not obeying the decree, though at law the plaintiff may immediately after judgment in his favour, issue process for the debt or damages and costs recovered, and take in execution the personal property, real estate or person of the defendant, circumstances much in favour of the jurisdiction of Courts of Law. (b) However, a Court of Equity has power in many cases to order the payment of the fund or money in dispute into Court at an early stage; (c) &

(b) 2 Mad. Ch. Pr. 468 to 474; Smith's Ch. Pr. 323 to 344.

(c) *Jervis v. White*, 6 Ves. 737; *Milis*

v. Hanson, 8 Ves. 67; Smith's Ch. Pr. 517, 518.

power which no Court of Law exercises excepting as a condition for granting a favour, as a new trial. And a Court of Equity may, after a person has been imprisoned for his contempt in not obeying a decree for some time, *sequester* his personal estate and the rents and profits of his land; (d) and the new acts, 1 Wm. 4, c. 36; 2 Wm. 4, c. 58, have in some other respects extended the jurisdiction in equity; but we shall in the course of this volume find that the jurisdiction in equity is still incomplete as regards the mode of enforcing its decrees.

SECT. II.—*Of the Jurisdiction and Practice of the Courts of Law at Westminster in general.*

It would be curious and somewhat entertaining to trace the history of the struggles of the respective Courts of Law and Equity at Westminster for jurisdiction, but an outline of the present jurisdiction must here suffice. In former times not only Courts of Law and Equity were continually invading each other's distinct jurisdiction, (e) but each superior Court of Law indecorously struggled with the other to extend its own jurisdiction by reciprocal invasions. Hence formerly all those devices and inventions in the practical proceedings, as the feigned form of *Latitat*, *Quare Clausum Fregit* and *Quo Minus*, which were unworthy contrivances to acquire or retain jurisdiction calculated to degrade as well the inventors as the administration of justice. It is indeed just ground of congratulation that in our time many of the ancient fictions and absurdities have been abolished, and that attempts have been made (in a degree successful) to establish a *uniformity of process and practice* in all the three principal Courts of Law, by 1 Wm. 4, c. 70, s. 11, and 2 Wm. 4, c. 39, and an opening has been made for introducing conciseness and a general amelioration of *pleading*, by 3 & 4 Wm. 4, c. 42, s. 1, 23, 24, and by the consequent rules of Hilary Term, 1834; and the judges of all the Courts are by those statutes invested with ample powers from time to time to make *new rules* for the improvement of the *practice and pleading*; powers which they are certainly at present anxious to exercise for the benefit of the suitors and the credit of the profession. But still it is to be regretted that no *general code* of precise jurisdiction and of uniform practice, to be peremp-

Outline of the jurisdiction of each Court.

(d) *Ante*, 310, n. (c); Smith's Ch. Pr. 323.

(e) *Read v. Brookman*, 3 T. R. 151; *Ex parte Greenaway*, 6 Ves. 812; *Kemp v. Pryor*, 7 Ves. 249; Bac. Ab. tit. Courts;

1 Mad. Ch. Pr. 25; *ante*, 307; Observations of Sir J. Nicholl in *Grignon v. Grignon*, 1 Hagg. Ecc. Rep. 545, *ante*, 307; and per Willes, Ch. J. in *Cheesman v. Hoby*, Willes, 680.

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Outline of the jurisdiction of each Court, whether formal or summary, or by way of appeal or error, or controlling inferior Courts, and when summary proceedings can or cannot be sustained.

torily observed in the three superior Courts of Law at Westminster, has not as yet been enjoined, so that it will be found that still in *many* respects the practice of one or more of those Courts differs materially from the others, and this even in the construction of a statute. (f) All these variations and contradictions will be noticed in the following pages. (g)

The jurisdiction of all these Courts is to be considered with reference, *first*, to the *subjects* of which they have original cognizance; *secondly*, to the course of proceedings, which are either *formal* or *summary*; and *thirdly*, the superintending jurisdiction over *other* Courts or jurisdictions: for it will be observed that (with the exception of the Court of Exchequer Chamber, the Privy Council, the Court of the Judicial Committee of the Privy Council, and the Judicial Court of the House of Lords, which are entirely or principally Courts of *appeal* from inferior tribunals,) almost all the other Courts have a threefold jurisdiction, viz, *first*, over certain *original suits* to be commenced and conducted there *formally*; *secondly*, over certain complaints and matters allowed by the common law or statute to be heard and determined *summarily*; and, *thirdly*, a jurisdiction over inferior tribunals either by *prohibition* to restrain them from improperly assuming a jurisdiction, or (at least in the King's Bench) by *mandamus* commanding them to act when they improperly neglect to proceed, and by way of *appeal* or *writ of error*. Thus all *actions* must be commenced, prosecuted and tried in a formal manner, as by explicit pleadings, *i. e.* a declaration, plea, replication, rejoinder, demurrer and judgment thereon, or an issue on a fact or facts tried by a jury, and a formal judgment thereon, in each of the superior Courts of Law; and certain other complaints must be conducted in formal suits in *Equity*, as by *bill*, *answer*, and *final hearing* and *decree*; and many suits in the Ecclesiastical Courts must be *PLENARY* or full and formal. On the other hand, by the established practice of each of these Courts, they have *summary jurisdiction* in numerous cases to afford redress on affidavit and motion, rule nisi, affidavits in answer, arguments on each side, rule absolute, and attachment to enforce their

(f) See one recent instance, viz. that in King's Bench the plaintiff cannot enter an appearance for the defendant after the vacation following the second term, *Budgen v. Burr*, 10 B. & Cres. 457; whereas in Exchequer he may enter the appearance at any time within four terms, *Cook v. Allen*, 3 Tyrw. Rep. 378.

(g) It is to be regretted that, with the

exception of Mr. Tidd's admirable work, all the other treatises on Practice, though in general ably composed, treat separately of the practice of the three Courts, and appear to labour to continue the distinctions, although the intent of the legislature and of the judges certainly is to assimilate the practice in all the Courts.

decision; also a very general course of proceeding summarily against their own officers and attornies, solicitors and proctors practising in each Court, and by long established *usage*, over *warrants of attorney* to confess judgment in each Court; and by *particular statutes*, over *awards*, *annuities*, *mortgages*, and claims of *landlords*, &c. The same distinction between formal and summary jurisdiction also prevail in the Ecclesiastical, Admiralty, and Prize Courts, where, instead of the proceeding being always by libel, answer and decree, the question may frequently be determined on petition or motion, &c.

It is of great importance not only to know the limits of these *formal* and *summary* jurisdictions, but to be able to decide when or not it will be judicious to adopt the latter. In general, suits must be *formal*, and it is only on matters of mere *practice* that each Court has, at *common law*, any jurisdiction in making rules; a right, however, which is so established, that a Court of Error will not, in general, examine into the propriety of a rule made in the inferior Court. (*h*) In all other cases, not merely respecting the *practice* of each Court, the power to proceed summarily entirely depends upon *particular statutes*, without which they could not be sustained. In cases of doubt, whether a summary proceeding is in point of law sustainable, the safer course is to proceed more formally; but when a summary proceeding is clearly permitted by law, it is not only less dilatory and expensive, but also often more effectual, and avoids difficulties that might be encountered in a formal suit. Thus, if an attorney has given an undertaking in that character, in reference to a pending suit, it may be enforced against him by *summary* proceeding; although, if a formal suit were brought, the same undertaking might be considered void for want of stating the consideration as required by the statute against frauds. (*i*) The applicant's affidavit is also received by the Court, although, on the trial of an action, the evidence of a party to a suit is in general inadmissible. There is, however, one considerable objection to a summary proceeding, viz. that the party opposing it usually *swears last*, and unless there be two or more deponents swearing positively to the *same matter* in favour of the application having occurred at the *same time*, it not unfrequently happens that the party resisting the application will swear so positively in the negative, (knowing that two witnesses to the same fact are in general required to convict of perjury,) that the application fails; though if the op-

(*h*) *Mellish v. Richardson*, 9 Bing. 125. *Greaves*, 1 Crompt. & Jervis, 372, 374;
(*i*) *Evans v. Duncombe*, and in *Re* and see *Hull v. Ashurst*, 3 Tyrw. R. 420.

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posing deponents had been examined as witnesses before a jury *viva voce*, their countenance or manner would have betrayed the untruth of their statement, and the plaintiff's case would have been established. Therefore, before a summary application should be attempted, the probability of the opponent's swearing so as to defeat it should be well considered. There is also a leading distinction between formal proceedings and summary motions, at least in Courts of *Law*, viz. that in general a plaintiff succeeding in a formal suit is certain of judgment for his costs, whilst upon a motion the Courts frequently exercise as much discretion over costs as a Court of Equity, and deprive the applicant of costs, although in other respects he may succeed. (*k*)

In many cases, when formal suits are not absolutely essential, the Courts, in order to save the expense of a proceeding which eventually may turn out not to be sustainable, permit the merits or propriety of the proposed proceeding to be discussed upon a *preliminary motion*, by granting a *rule to shew cause*, founded on the applicant's affidavit, *why a writ of habeas corpus, or mandamus, or prohibition, or quo warranto, or certiorari*, should not be issued, and then the opponent shews cause upon his affidavits, and the Court hear and determine upon the propriety of the required proceeding before it actually takes place, by which, in many cases, much useless trouble and expense is saved. The expediency of this preliminary measure was strongly advocated by the late Mr. Evans, as respects the writ of habeas corpus, and is now generally practised. (*l*)

It has been held in equity that a proceeding by summary application does not preclude the party from afterwards proceeding by formal bill to obtain the same object, if he proceed with a view to save his right of appeal; (*m*) and it has been decided that although a statute give an appeal to two commissioners, that summary remedy does not prevent the party from bringing a formal action to try the validity of the proceeding. (*n*)

Originally the three Superior Courts of Law, viz. King's Bench, Common Pleas, and Exchequer, had in most respects separate, distinct, and exclusive jurisdiction, viz. the *King's Bench* over criminal matters and trespasses *vi et armis* committed in the county where the Court sat; the *Common Pleas*,

The present co-extensive jurisdiction of all the Superior Courts of Law at Westminster, and exceptions.

(*k*) See a recent instance in *Clatterbuck v. Combes*, 5 B. & Adol. 402.

(*l*) See *ante*, vol. i. 691 to 696, and title Habeas Corpus Act, Chitty's Col. Stat. 344, note (*b*). The case of *Millard v. Millman*, 3 Moore & S. 63; *Barnett v.*

Harris, 2 Dowl. Rep. Pract. 31, proceeds on the same principle.

(*m*) *Wall v. Attorney-General*, 11 Price, 643.

(*n*) *Re Shaftesbury v. Russell*, 1 Barn. & Cres. 666; 3 Dowl. & Ryl. 84.

exclusively over *real, personal, and mixed actions* between party and party, except in a few cases where the officers of another Court were concerned; and the *Court of Exchequer*, over all *revenue* matters. (n) But each of those Courts, by the contrivances alluded to, viz. by the writ of *latitat* in the King's Bench, supposing a trespass in Middlesex, the writ of *quare clausum fregit* in the Common Pleas, and the *quo minus* in the Exchequer, have long assumed a *coextensive jurisdiction* over all *personal* actions, when the right of the plaintiff is *legal* and not equitable, nor spiritual, ecclesiastical, or maritime, nor has arisen out of an illegal capture; (o) so that complainants (subject to a very few exceptions) now have in general, in all *personal* actions, the option of suing in either of the Courts. (p)

To this general rule there are exceptions, as that *officers* (q) of another superior Court, in respect of their duty to be in constant attendance there, and an *attorney* of another of the superior Courts, in respect of his duty to conduct or defend the causes of his clients there, must be sued in his particular Court, so that he may not be withdrawn from his duty. (r) But where the plaintiff is also such officer or attorney, then *his* privilege to *sue* in his own Court prevails against that of the defendant; (s) and though it was held in the King's Bench, that in the latter case the defendant could not be *arrested*, though he might be *sued* in the plaintiff's Court; (t) yet the Court of Exchequer in a subsequent case held the contrary, and that attorneys and clerks of the Exchequer of Pleas might in that Court *arrest* as well as *sue* attorneys of another Court. (u) *Serjeants* and their clerks are also privileged to be sued in the Common Pleas; (x) but *Barristers*, who may now practise in all the Courts, (y) have no privilege to be sued in any particular Court, although he is privileged from arrest or imprisonment whilst attending any Court or on the circuit; (z) and it has

Exceptions as to officers and attorneys, &c. of each particular court.

(n) 3 Bla. C. 46.

(o) *Ante*, p. 1, 2.

(p) For the history of these contrivances, see Appendix to the first edition of Seldon's Practice, vol. i., and Gilbert's Practice, C. P.

(q) *Baker v. Swindon*, 1 Ld. Raym. 399; 3 Salk. 283, S. C.; Cases Pr. C. P. 104; Pr. Reg. 380; Barnes, 371, S. C.; Tidd, 80.

(r) *Duffy v. Oakes*, 3 Taunt. 166; *Willshire v. Lloyd*, 1 Dougl. 381; *Comerford v. Price*, id. 312; *Gardner v. Tesson*, 2 Wils. 42; *Atkins v. —*, 2 Chitty's Rep. 63; Tidd, 9th ed. 80, 81.

(s) *Elkins v. Harding*, 1 Crompt. & J.

345; *Bowyer v. Hopkins*, 1 Young & J. 119.

(t) *Pearson v. Henson*, 4 Dowl. & Ry. 73; Tidd, 9th ed. 80.

(u) *Bowyer v. Hopkins*, 1 Young & J. 199; *Pitt v. Pocock*, 2 Crompt. & M. 46; Tidd, 9th ed. 91.

(x) *Baker v. Swindon*, 1 Ld. Raym. 399; 3 Salk. 283, S. C.; Tidd, 80.

(y) This was declared by the king's warrant on the 24th April, 1834, enabling all barristers to practise in the Court of Common Pleas in term, giving the serjeants precedence. See warrant, 10 Bing. 571, *post*, Common Pleas.

(z) *Meekins v. Smith*, 1 H. Bl. 636; *Luntley v. —*, 1 Crompt. & J. 579.

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been recently decided, that a barrister may be sued in the London Court of Conscience. (a)

It is not judicially settled whether the Uniformity of Process Act, 2 Wm. 4, c. 39, affects the privilege of an officer or attorney to be sued in his particular Court. The first section of that act certainly abolishes the ancient necessity to sue a privileged person by any particular form of process different from that against ordinary persons, and prescribes a new general form of process, and enacts "that such process may issue from either of the said Courts;" but the nineteenth section continues all exemptions from arrest, and the statute contains no express clause taking away the right to be sued only in a particular Court, and, therefore, some authors insist that such privilege continues, (b) but another author appears to have considered that it no longer exists. (c) It is submitted, however, that so important a privilege continues, for the only object of the statute was to secure the same form of process in each Court, but without interfering with any privilege; and if the act is to be construed to take away the privilege of an attorney to be sued in his own Court, it might equally be construed to take away the privilege of a revenue officer to be sued in the Exchequer, and many other privileges which certainly were not intended to be affected by that act.

Revenue officers.

There is also a peculiar prerogative jurisdiction of the Court of Exchequer to remove into the Office of Pleas all cases touching the revenue of the crown, and if an action be brought in any other Court against any officer of revenue, whether of customs or excise, or otherwise in respect of any transaction connected with the execution of his office or duty, whether under process or otherwise, such action may be removed into the Court of Exchequer, on the alleged ground that as that Court is peculiarly conversant with all questions arising upon the construction of the revenue law, it is desirable that the propriety of the conduct of such officers should be there determined, (d) nor is it necessary that the king's interest should be in question. (d) But as such a prerogative is calculated to excite suspicion of partiality and favour to the officer, it would be for

(a) *Wettenhall v. Wakefield*, 10 Bing. 335.

(b) *Chapman's King's Bench Practice*, Addenda, 75; *Tidd's Supplement*, A.D. 1833, p. 65.

(c) *Chitty*, T. edit. *Archbold's Pract.* vol. i. 21; vol. ii. 632, and note (h).

(d) *Cawthorn v. Campbell*, 1 Anstr. 205; *Siddons v. East*, 1 Crompt. & J. 12;

and see *Hammond's case*, Hardr. 176; *Pennney v. Bailey*, Bunb. 309; *Berkley v. Walters*, id. 306; *Lamb v. Gunman*, Parker, 143; *Re Kingsman*, 1 Price's Rep. 206; *Beningfield v. Stratford*, 8 Price, 584; *Man. Exch. Prac.* 161, 164; *Bac. Ab. Court of Exchequer*, B.; *Vin. Ab. Court of Exchequer*, P.; 3 *Bla. Com.* 44, note (24), id. see the practice.

the honour of the crown and its officers if it were annulled, or at least not acted upon. (e) When this prerogative proceeding applies, the Court of Exchequer interposes on motion, by ordering the proceeding to be removed into the Office of Pleas, and which order operates by way of injunction. The usual order in cases of this nature is, "that the action be removed out of the Court in which it is depending into the Office of Pleas, and that it be there in the same forwardness as in the other Court." The order however does not operate as a *certiorari* to remove the proceedings, but merely as a personal order on the party to stay them there, and of course requires the defendant in the action to appear, accept a declaration, and put the plaintiff in the same state of forwardness in the Office of Pleas as he was in the other Court. (f)

There is a privilege even more extensive in favour of an officer of the Court of Chancery, or other person sued for any thing done in that capacity, for that Court has jurisdiction to stay *by injunction or order* any suit against any person for executing the process of their Court, although it was issued irregularly, and a trespass committed. (g) And the Court of Chancery will not allow a person to bring an action at law for damages for an improper arrest under an attachment out of a Court of Equity, though it will refer it to the master to inquire what compensation he ought to receive. (h) The practice seems to be by injunction to restrain the proceeding at law, but without prejudice to any application the party may be advised to make to the Court of Equity for compensation; (i) or supposing sequestrators on process of a Court of Equity should have seized property claimed by a third person, his only course is to apply to the Court for leave to bring an action of ejectment or trover, or to be examined in the chancery suit as to his interest in the land or goods sequestered. (k)

Officers of
Courts of
Equity.

(e) The mode in which justice is at present administered in revenue causes in the Court of Exchequer is free from suspicion, but still it is to be regretted that such a prerogative should exist, or at least be exercised. Until lately special jurors in the Exchequer, when they found a verdict for the crown, had two guineas each, and only one guinea when they found for the defendant. And it is upon record, that if a special jurymen frequently found a verdict against the crown, or even hesitated, care was afterwards taken that he should not be on the jury. But these odious distinctions are no longer adhered to.

(f) Per Eyre, C. B. in *Cawthorn v.*

Campbell, 1 Anstr. 205, in notes.

(g) 1 Mad. Chan. Prac. 135 to 137; Smith's Chan. Prac. 342, 344, 345; *Frowd v. Lawrence*, 1 Jac. & W. 655; *Kaye v. Cunningham*, 5 Mad. 406; *id.* 297; 2 Swanst. 313; *Baily v. Devercur*, 1 Vern. 269; Chitty's Eq. Dig. 589; see post, Prohibition.

(h) *Batchelor v. Blake*, 1 Hogg. 98; Chitty's Eq. Dig. 1482.

(i) *Frowd v. Lawrence*, 1 Jac. & W. 655; and references Smith's Chan. Prac. 342. See as to proceedings against sequestrators, who have seized property of a third person, Smith's Chan. Prac. 344, 345.

(k) *Brooks v. Greathead*, 1 Jac. & W. 178; Smith's Chan. Prac. 344.

CHAP. V.
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Where debt or
damages are
small.

In general these superior Courts have jurisdiction, however *small the debt or injury*, and at common law it is no answer or defence that the debt or damages to be recovered will be under forty shillings; and although there be a local Court, yet, if the case is not in all respects within its jurisdiction, or the complainant could not otherwise proceed therein, then he may sue in the superior Courts, but subject to the power of the judge to certify under 43 Eliz. c. 6, when the damages recovered are less than forty shillings, and thereby deprive him of costs; *(l)* for the smallness of the damages is no reason that the complainant should lose them. *(m)* There are however in most parts of England local inferior jurisdictions, usually called *Courts of Request*, or *Courts of Conscience*, very inconveniently varying from each other in their respective provisions, *(n)* some prohibiting suits for debts under £10, others under £5, and others under £2, from being brought in any other Court, and to be taken advantage of by the defendant in different ways, pointed out by each particular act, as by motion or plea or suggestion; *(o)* and sometimes containing a general prohibition from suing in any other Court, in which case the objection is even a ground of nonsuit. *(p)* As those local Courts have no jurisdiction to summon witnesses out of the jurisdiction, and in general all inferior Courts are confined to causes of action which originally arose within their jurisdiction, or at least where an account had been there settled, it might have been supposed that such Courts could not take cognizance of causes of action that had arisen out of their jurisdiction; it has however been decided, that in general when the defendant resides, and could have been served with process within the jurisdiction, the inferior Court may proceed, although the cause of action accrued elsewhere, and this, although the plaintiff was wholly ignorant of such residence of the defendant, and actually served him with process from the superior Court out of the inferior jurisdiction. *(q)* Hence the necessity for ascertaining when the debt is small, whether some local jurisdiction may not preclude the plaintiff from suing in

(l) *Wright v. Nuttal*, 10 Barn. & Cress. 492.

(m) *Ante*, vol. i. 28; *Tubb v. Woodward*, 6 T. R. 175; *Busby v. Fearon*, 8 T. R. 235.

(n) See the collection of these statutes by Mr. Tidd Pratt; and see Chit. Col. Stat. tit. Costs. A general act consolidating the enactments is required.

(o) See the statutes and notes in Chit. Col. Stat. tit. Costs; Tidd Pratt's Courts

of Request Acts.

(p) *Rex v. Johnson*, 6 East, 583; *Parker v. Elding*, 1 East, 352; *Doulson v. Matthews*, 4 T. R. 503; 1 Chit. on Pleading, 475, 476.

(q) *Graham v. Browne*, 2 Crompt. & J. 227; *Baldon v. Pitter*, 3 Barn. & Ald. 210; 1 Chitty's Rep. 635, S. C.; *Oaks v. Albin*, McClell. Rep. 502; *Spencer v. Holloway*, 15 East, 674.

a superior Court. So even where the defendant is an attorney, and could not have been sued in an inferior Court, if the damages recovered against him should be *under forty shillings*, the judge may certify under 43 Eliz. c. 6, so as to deprive the plaintiff of costs. (r)

The recent enactments 1 Wm. 4, c. 70, and subsequent acts, do *not alter the jurisdiction* of the Superior Courts at Westminster, excepting that the sect. 1, 13 and 14, add a *fifth judge* to each Court, and abolish the Courts of Sessions in Cheshire and Wales, and distribute and remove the *suits(s) then depending* in such Court, amongst the Courts at Westminster, viz., the power of amending the records of fines and recoveries suffered in the Welsh Courts, is transferred to the Court of Common Pleas, depending actions into the Exchequer, criminal prosecutions and informations in the nature of *quo warranto* into the Crown Office of the Court of King's Bench, and depending suits in equity into the Courts of Chancery or Exchequer, and leaving all *future* suits and proceedings to be instituted in one of those Courts, according to its appropriate jurisdiction. (t) The recent changes in the law principally alter only the *forms of proceedings*, and enforce a *uniformity of process* to bring the defendant into Court, either by summons or by *capias*, when the party is to be arrested, (u) and authorize all the fifteen judges, or at least eight of them, including the three chiefs, to make *general rules* for regulating the *proceedings of all* the three Courts, (x) and during five years, from 1 June, A.D. 1833, to make rules relative to *pleading*, to come into force after they have laid before parliament for six weeks. (y) But still each Court retains its antecedently existing jurisdiction of making rules for regulating their *own particular proceedings*, and continues their previous rules and peculiar practice in force, "*provided they be not repugnant to the general rules so made*;" (z) and accordingly the Court of Exchequer have promulgated such particular rules relating to the practice of their own Court; (a) and very recently the Court of

Alterations and extension of jurisdiction of Courts of law by recent acts.

(r) *Wright v. Nuttal*, 10 Barn. & Cress. 492.

(s) It was decided that a judgment on a *warrant of attorney* to confess judgment in one of the Courts of Great Sessions in Wales, given previously to 1 Wm. 4, c. 70, could not be entered up in the Court of Exchequer, as that instrument could not be deemed a *suit*. *Williams v. Williams*, 1 Crompt. & Jerv. 387; *Jones v. Clarke*, *id.* 447.

(t) 1 Wm. 4, c. 70, s. 14.

(u) 2 Wm. 4, c. 39.

(x) 1 Wm. 4, c. 70, s. 11; and see *Rules Trin. Term*, 1 Wm. 4, A.D. 1831, made thereon, and *rules Hil. Term*, A.D. 1832.

(y) 3 & 4 Wm. 4, c. 42, s. 1; and the *Rules of Hil. Term*, 1831, thereon, relating principally to *pleading*.

(z) 1 Wm. 4, c. 70, s. 11.

(a) See the *General Rules of Court of Exchequer*, *Mich. Term*, 1 Wm. 4; 1 Crompt. & Jerv. 270 to 285.

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By what circumstances the option to sue in a particular Court may be influenced.

Common Pleas has promulgated particular rules relative to the acknowledgment of deeds under the Fine and Recovery Act. (a)

Subject to the before enumerated exceptions, the great bulk of litigation between private subjects (consisting principally of *personal actions* and the action of *ejectment*) may be instituted in either of these three principal Courts at the option of the plaintiff. But still there are many circumstances, as well at law as in equity, or of a spiritual or ecclesiastical nature, not strictly of *jurisdiction*, but of essential importance to be considered, in preferring one Court to the other, and a few of which we will now endeavour to suggest.

These principally relate to, *first*, the nature of the question, whether of fact or law; thus, if it be *even* collaterally connected with the criminal law or corporation law, or parochial settlement, &c., the King's Bench may be preferable, because those subjects are there most frequently discussed, and consequently best understood. If on the other hand it relate to real property, or require a very full and deliberate investigation, then it may be advisable to proceed in the Court of Common Pleas; (b) whilst if the matter be connected with a revenue question or the subject of tithe, the Court of Exchequer should in general be resorted to; unless the interest of the crown or of a revenue officer be opposed to the complainant; because in general revenue and *tithe* questions are there most frequently discussed.

Secondly, Should be ascertained the probable favourable or adverse decision, opinion or even inclination of one or more of the judges of a particular Court, not only upon certain questions of *law*, but also upon some matters of *fact*, or ethics, or evidence affecting, or at least bearing upon, the point of *law* or *fact* to be decided in the particular case, or his sentiments upon the amount of *damages* that should be awarded in some actions connected with the feelings; as in actions for criminal conversation or for debauching a daughter, or for a libel, &c., or on the subject of *costs*, and differing from that of the other Courts or judges; and especially who will be the judge before whom the cause would probably be tried. (c)

(a) Stat. 3 & 4 W. 4, c. 74, s. 39; and rule C.P. Trin. Term, 4 W. 4, A.D. 1831.

(b) It is to be regretted that an exclusive jurisdiction over all conveyancing and real property questions, and actions of ejectment, has not been vested in or rather restored to this Court, as they would certainly be there better discussed and considered, and an uniform system of real property law established.

(c) More than mere allusion to examples might be improper; but it is well

known that in one Court there is a judge pre-eminently distinguished for his high constitutional principles and just views of the rights of the crown and of the subject, and who, in all trials between the king and the people, will always evince his opinion that the dignity of the crown is best upheld by the waiver of prerogative, when in competition with the just interests of the subject. In another Court a judge, distinguished for his profound general legal knowledge and excellent

Thirdly, The whole practice of all the three Courts, as it may apply to the particular suit or business, or at least when in any important respect it may differ in one Court from the other, should be considered, and whether on account of any difference it will be preferable, either as regards the principal stages in the cause, or some subordinate or collateral matter, or even in the more liberal allowance of costs, to proceed in one Court than in the others. (*d*)

Thus there is a difference in the practice of the Court of King's Bench and Common Pleas in favour of the former, as regards the lien of the plaintiff's attorney, when there is a cross suit or proceeding, and which difference would, when there are or likely to be cross actions or proceedings, render it advisable for the plaintiff's attorney to prefer the former Court; (*e*) for in the King's Bench the debt and costs of one action cannot be set off against those of another, without at least providing for the lien of the plaintiff's attorney being satisfied in full, (*e*) whilst in the Common Pleas (*f*) and in a Court of Equity (*g*) the attorney's lien is not allowed to prevent such set-off.

dispassionate decisions; and in the other Court of law a judge, justly celebrated for his perspicuity, especially in all subjects relative to patents and inventions, and before whom therefore a complicated patent cause might with confidence be tried. It will not be denied that in many cases, it is of the utmost importance, not only that the judge should be of general ability, but also be familiarly acquainted with the subject to be tried, for otherwise he will not be able to explain and observe upon to the jury the facts and law applicable to the case, and a just result will be endangered. Lord Mansfield was celebrated for his great knowledge of insurance and mercantile law, and, consequently, whilst he presided, an admirable system of mercantile law, as regarded those subjects, was established. Whilst it is well known that another judge was so entirely ignorant of insurance causes, that after having been occupied six hours in trying an action on a policy of insurance upon goods (Russia duck) from Russia, he in his address to the jury complained that no evidence had been given to show how Russia ducks (mistaking the cloth of that name for the bird) could be damaged by sea water and to what extent. In the time of the late Lord Kenyon, we remember that verdicts for large damages were favoured in actions for all violations of morality and injuries to the feelings, and upon motives quite consistent with the existing principles of

law as explained by the late Lord Erskine. Whilst before another deceased judge the mere suggestion of conspiracy or fraud inclined him towards conviction, but yet who abstained from giving moral lessons from the bench; although another judge, carried away by the latter object, not unfrequently lost sight of the main point in the cause. These few instances are merely alluded to, in order to evince the expediency of some consideration of the tribunal to be selected.

(*d*) Thus in K.B. if the sentence against the *principal* for a criminal offence be under consideration, perhaps time might be given to put in bail, but not so in C. P. *Joyce v. Pratt*, 6 Bing. 377; but see *Bennett v. Kinnear*, 3 Moore, 259; *Ashmore v. Fletcher*, 13 Price, 523, *post*. So a warrant of attorney in the Exchequer, at least as regards a summary application for relief against it, may be a better security than in K. B. or C. P. *Matthews v. Lewis*, 1 Anst. 7; 2 Man. Ex. Pr. 500, *sed quare*; see *post*, Exchequer.

(*e*) Tidd's Pr. 9th ed. 339, 992; 3 B. & Cres. 535; 2 B. & Cress. 800; 4 T. R. 123; 6 T. R. 456; 8 T. R. 70; 1 Dowl. & R. 168.

(*f*) 8 Bing. 29; 1 Moore & Scott, 93, S. C.; 1 Dowl. Pr. Cas. 242; *Hall v. Ody*, 2 Bos. & P. 23; *Schoole v. Noble*, 1 Hen. Bla. 23; 4 Taunt. 632; 8 Taunt. 526.

(*g*) 15 Ves. 72, 539; 2 Ball & B. 34; *Hullock on Costs*.

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Fourthly, The arrear or state of business in the respective Courts, and the certainty or probability of obtaining a trial or decision sooner in one Court than the other, especially when an important witness, whose viva voce testimony may be material, is about to leave the kingdom, or reside at a great distance from the place of trial. (*k*)

Fifthly, Relating to the retainer or employment of one or more particular counsel, either of generally superior talent or influence in a particular Court, or of paramount knowledge of the particular question of fact or law, or particular ability in the examination of a known difficult witness, or of peculiar zeal upon some particular subjects of litigation, (*l*) and especially whether it be certain such counsel will attend during the whole trial, or upon argument, or upon a motion for a new trial, or in arrest of judgment, or perhaps be absent at some critical time; (*m*) and whether in case all the most efficient counsel practising in a particular Court should have been already retained for the defendant, it may not be advisable to proceed in another Court, or abandon the already commenced action, or whether it will be preferable specially to retain, even at an increased expense, a pre-eminent counsel usually practising in another Court, or on another circuit, and oppose him to those already retained by the defendant, or even for a defendant to file a bill in the Exchequer, and by an injunction there stay a trial. In a preceding page it was observed, that when the merits strongly preponderate in favour of one party, he will usually succeed with the assistance of *any* counsel; but it too frequently occurs, even at the present time, that extraordinary talent in a particular counsel will really prevail against the justice of the case. (*n*) There are also numerous other instances where judgment may be usefully exercised in the selection of a particular Court or remedy in preference to another, and which will be pointed out in the progress of this chapter.

Before the late act 1 W. 4, c. 70, sect. 8, successive writs of error were sustainable in certain cases from the judgment of

(*k*) Notwithstanding the now established power of enforcing the examination of witnesses abroad or about to proceed abroad on interrogatories, see *post*, 346, and 1 W. 4, c. 22; still it is frequently of the utmost importance to secure the actual attendance and examination of witnesses viva voce on the trial. And see *Macaulpine v. Poyles*, 3 Tyr. R. 871.

(*l*) At the time that Sir W. Garrow, my earliest patron at the bar, practised as an advocate, it is well known that his talent in cross examination very fre-

quently occasioned verdicts that would inevitably have been the other way, if the witness had been examined by any other counsel. And in such respect was his peculiar talent held, that most judges suspended for the time the practice of slowly taking down all that was sworn, in order to give full effect to his skilful and energetic mode of rapidly pressing varying questions in order to detect falsehood.

(*m*) See *ante*, 3d part, p. 71.

(*n*) *Ibid*.

the Court of Common Pleas into the Court of King's Bench, and afterwards from thence into the Exchequer Chamber, and then into the House of Lords, and which were certainly adverse to the Court of Common Pleas, and favourable to the King's Bench and Exchequer of Pleas; and these successive stages of delay were permitted contrary to the general principle that *multiplicity of appeals* ought not to be favoured, (o) and at that time, in order to avoid the delay incident to these proceedings, it was advisable, when the debt exceeded 50*l.*, or even when less, at an increased expense to be borne by the plaintiff, to commence the action by original writ returnable in King's Bench, in which case the writ of error must have been brought at once in the House of Lords. But now as that statute in all cases requires every writ of error upon the judgment of either of the superior Courts to be brought in the first instance in the Court of *Exchequer Chamber*, before the judges of the two other Courts, and upon the judgment in the Exchequer Chamber in the House of Lords, it follows that it is so far immaterial whether the action be commenced in the K. B., C. P., or Exchequer; and this act, together with the uniformity of process act, 2 W. 4, c. 39, have greatly tended to equalize the number of actions in each Court.

So, formerly, as only a serjeant could be heard in the Court of Common Pleas in support of or against a motion for a new trial, it became important to consider, before the commencement of the action, whether the counsel who would conduct the trial would or not be serjeants, and if not, then to proceed in the King's Bench; because the greatest inconvenience, if not loss, has arisen from a serjeant having to speak upon a new trial when he was not concerned in the cause at Nisi Prius, and consequently was comparatively ignorant of what had passed on the trial. But now, by the recent opening of the Court of Common Pleas to all barristers as well as serjeants, that objection has been judiciously removed. (p) These few of very numerous circumstances that may influence the choice of a particular Court, are stated only as instances, and to impress practitioners with the necessity for keeping in view the difference in the practice of the Courts, which will be enumerated in the course of this volume.

We will now proceed to state the jurisdiction of each Court in particular, and occasionally suggest the expediency, under

(o) *Parham v. Templer*, 3 Phil. Ec. Cas. 255. Per Sir J. Nicholl. "Although the law favours the right of appeal, yet it does not favour the *multiplication* of

appeals."

(p) See the king's warrant, 10 Bing. 571, 572; and *post*, Court of Common Pleas.

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particular circumstances, of proceeding in one Court in preference to another.

SECT. III.—*Jurisdiction of the Court of King's Bench.**First, Over Civil Matters.*

1. Formal actions.
 1. Personal actions.
 2. Mixed actions.
 3. Not over real actions.
2. Summary over
 - Habeas corpus.
 - Awards.
 - Annuities.
 - Mortgage Deeds.
 - Bail bonds and replevin bonds.
 - Warrants of attorney.
 - Officers of the Court, sheriffs, bailiffs.
 - Attornies and artied clerks.
 - Costs of election petitions.
3. Furtherance of the Court's own jurisdiction
 - Under interpleader act, 1 & 2 W. 4, c. 58.
 - Under commission and interrogatory act, 1 W. 4, c. 22.
 - In what respect has power to compel a discovery.
4. In aid of civil jurisdiction of other Courts, or in compelling them to act, or restraining them from acting, or on appeal from their decision.
 - In general.
 - Answering case from a Court of equity.
 - Trying an issue from such Court.

Enforcing judgments of inferior Courts.

Mandamus to compel inferior Courts, or officer, to act.

Prohibitions.

As a Court of error and appeal.

1. Formally.

2. Summarily, as between landlord and tenant.

3. In other cases.

Secondly, Over Criminal and Public Matters.

In general.

By indictment.

By criminal information.

Alteration of practice in giving judgment immediately after trial, &c.

By articles of the peace.

Informations in nature of quo warranto.

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Summary by certiorari over convictions and orders.

Coroners' inquests.

Cases stated by Court of sessions.

Poor rate itself.

Assessments.

Settlements, orders of removal, &c.

Sewers, controul over commissioners.

III. The jurisdiction and general practice of the Court of King's Bench. (q)

The jurisdiction of the Court of King's Bench is by far the most extensive of all the Courts, whether of law or equity, for it has cognizance as well of all *criminal matters* as of *most civil injuries*, and has also considerable jurisdiction over matters collateral or distinct from any formal suit, and over inferior Courts. It administers justice either in *formal civil actions* decided upon demurrer on points of *law*, or by a jury trying formal issues of *fact*, or it affords justice *summarily* upon *affidavit*, *motion*, *rule nisi*, and *rule absolute*, and enforces the latter with *costs by attachment*. So as regards *criminal* and *public* proceedings, there will be found a similar distinction between *formal* indictments and informations, and more summary proceedings.

(q) See in general 3 Bla. Com. 41, Bench, A. 2; Com. Dig. Courts, B. ; 2 109; Bac. Ab. tit. Courts of King's Inst. 23, 71, 550.

We have seen that originally the Court of King's Bench had merely jurisdiction over *criminal matters and trespasses vi et armis*, committed in the county where that Court happened to be, and actions against persons in the *actual custody* of the marshal, and against the *officers and attornies* of the Court, who were not to be compelled to answer elsewhere; and by the express terms of Magna Charta, 9 H. 3, c. xi., it was enacted that "*Common Pleas shall not follow our Court, (i. e. of K. B.) but be holden in a certain place.*" (r) At length, however, by feigning that a trespass had been committed in Middlesex, where the Court had then fixed, or that the defendant was in the custody of the marshal, the Court assumed and finally established a jurisdiction over *all personal actions*, though before only cognizable in the Court of Common Pleas. (s) So that (subject to the exceptions before noticed relative to officers and attornies of another Court, (t) and revenue officers, (u) and persons executing the process of the Court of Chancery, (x) and also subject to a few enactments requiring actions thereby given to be brought in the Exchequer,) it is now established that every complainant has the choice of commencing in the King's Bench all formal *actions of account*, (strictly so called,) *assumpsit, covenant, debt, detinue, case* of every description, whether for injury to the person, personal property, or real property, *trover, replevin* and all actions of *trespass vi et armis*, whether for direct injuries to the *person*, as for assault, battery, false imprisonment, or for direct injuries to *personal or real property* in England or Wales, or in the counties of Chester and city of Chester; (y) and this whether the cause of action arose in Middlesex or elsewhere in England, or any part of the world, with the exception of local injuries, where the real property affected was out of the kingdom; also, over writs of *scire facias* on records, whether recognizances or judgments, in favour of private individuals. Such extensive jurisdiction over *personal actions* appears to have been recently recognized and impliedly confirmed by the uniformity of process act, 2 W. 4, c. 39; and indeed it had been too long practised to be disputed with effect. (z) The ancient proceeding

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First, What
jurisdiction
over civil mat-
ters.

(r) This extended as well to K. B. as to the Exchequer, and hence no real action could be brought out of C. P. except by the king, 2 Inst. 23; 2 Rol. Rep. 290.

(s) Ante, 311; Trys. Jus. Filizarii, 28; Tidd, 9th ed. 37; Sellon's Prac. 1st ed. Append. vol. ii.; 3 Bla. Com. 287.

(t) Ante, 315.

(u) Ante, 316.

(x) Ante, 317.

(y) 1 W. 4, c. 70.

(z) 3 Bla. Com. 287; Tidd, 150; Fulke v. Bourke, 1 Bla. Rep. 462; Barber v. Lloyd, 2 T. R. 513; 2 Saund, 52, note 1; 2 Chitty's Rep. 60.

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by *audita querela* (still in force, though not used in practice, in consequence of a summary motion for relief having been in general substituted,) is sustainable in K. B. if the original action were in that Court; (a) and *scire facias* to repeal the king's *patents* are usually tried and determined in this Court. (b) With respect to *penal actions*, we have already shewn that a common informer cannot sue for a penalty unless he be expressly or impliedly authorized so to do, and in general the particular statute directs the Court in which the proceeding is to be instituted. (c)

Over what
mixed actions.

But the Court of King's Bench has no jurisdiction over *mixed actions*, excepting that of *ejectment*, (always laid *vi et armis*), (d) for even *quare impedit* (also a mixed action) can only be brought in the Court of Common Pleas, excepting when the king is the plaintiff, who may proceed in *quare impedit* in either of the superior Courts of Law. (e)

Not over real
actions.

As to *real actions*, the Court of King's Bench has *no original* jurisdiction in any real action, unless at the suit of the king, who has the choice of all his Courts. (f) So that if the Court of King's Bench were to issue a writ of grand cape to seize land in a real action, commenced in that Court, an action of trespass would be sustainable against the officer executing it; (g) and yet, singularly, before the 1 W. 4, c. 70, s. 8, writs of error upon a judgment of the Common Pleas in all real actions, were returnable and heard and determined in this Court; so that, although not competent originally to entertain such a suit, it was allowed, as a Court of Error, to controul and overrule the decision of the Court of C. P. (h)

Summary juris-
diction.

Besides this extensive jurisdiction over formal personal *actions*, this Court has, either at common-law, or by particular statutes, very extensive *summary jurisdiction*. The summary proceedings in this Court of a *civil* nature, to obtain redress for some private injuries, are principally *habeas corpus*, or re-

(a) Fitz. N. B. 105, 106; 2 Sell. 359; see Practice in Audita Querela, 2 Man. Ex. Pr. 376 to 382.

(b) 4 Inst. 72; and see Haworth v. Harcastle, 10 Bing. 551. *Scire facias* to repeal a patent lies at the suit of a private person, if prejudiced thereby, Brewster v. Weld, 6 Mod. 229. But costs not recoverable, Rer v. Miles, 7 T. R. 357; The King v. Bingham, 1 Tyr. R. 262; Tidd, 1094, 5, 6; Com. Dig. tit. Patent, F.; 2 Saund. R. 5 ed. 73, o. p.

(c) Ante, vol. i. 25 a.; Fleming v. Barley, 5 East, 313; and see in general

1 Tidd, 517 to 520.

(d) 2 Inst. 23; Com. Dig. Courts, B. 1.

(e) Com. Dig. Courts, B. 1, B. 2; 4 Inst. 71; Fitz. N. B. 32, c.; Sellon's Prac. 1 ed. vol. ii. 321; Tidd, 734, 870, 946.

(f) Com. Dig. Courts, B. 2; Bac. Ab. Court of King's Bench, A. 2.

(g) Weaver v. Clifford, 2 Bulst. 64; Marshalsea Case, 10 Coke, 76 a.

(h) As in Formedon, Cockrell v. Cholmondeley, 10 B. & Cres. 564; in *quare impedit*, Gulley v. Bishop of Exeter, 10 B. & Cres. 584

lating to *awards, annuities, mortgages, bail bonds, replevin bonds, warrants of attorney, officers of the Court, sheriffs, bailiffs, attornies, and articulated clerks,* &c. In general in every summary proceeding founded on a statute, the direction of the act must be very strictly pursued. (i)

The habeas corpus acts and proceedings thereon have been stated in the preceding volume. (j) At common law, as the Court of C. P. originally had jurisdiction only in civil actions, and the Exchequer only in civil actions and revenue prosecutions, the Court of King's Bench in term time, and the Chancellor at all times, were the only tribunals for discharging when a party was in custody on a *criminal* charge. And although since the habeas corpus acts, 31 Car. 2, c. 2, and 56 Geo. 3, c. 100, all the superior Courts and each of the judges and barons have equal and *concurrent jurisdiction* to issue a writ of *habeas corpus*, and discharge from illegal imprisonment, and each judge and baron *must*, if applied to, act *in vacation*, at the peril of forfeiting £500 in case of refusal; (k) yet in practice it is advisable to apply to the Court of King's Bench or one of its judges, *in preference* to any other Court or judge, in all cases where a party is illegally imprisoned under colour of the process or proceedings of that Court, or upon any *criminal charge*, or upon a commitment of *commissioners of bankrupt*, (l) or upon an illegal sentence or proceeding of an Ecclesiastical Court, (m) or under a commitment by the chief justice of K. B., (n) or upon the supposition of an offence against the *revenue* having been committed: *first*, because the judges of K. B. are more in the practice of considering and deciding upon criminal subjects, and the requisite forms of process, warrants, convictions, orders, and commitments, than the other Courts; and this Court, as observed by Lord Holt, is the constitutional protector of the liberty of the subject; *secondly*, because the legality of imprisonments for alleged offences against the revenue, probably upon the charge of some interested officer, require strict and impartial investigation, and this Court is as much bound to take care of the liberty of the subject as to protect the revenue from fraud. Accordingly in all cases of criminal charges and of illegal or irregular imprisonments under statutes for the protection of the revenues of cus-

(i) *Jones v. Fitzaddams*, 3 Tyr. R. 904; *Baynes v. Baynes*, 9 Ves. 462.

(j) *Ante*, vol. i. 684 to 695; and see the statutes at length, Chit. Col. Stat. False Imprisonment, 344 to 349.

(k) 31 Car. 2, c. 2, s. 10.

(l) *Ex parte Harrison*, 1 B. & Adol.

410.

(m) Vern. 24; Sid. 181; Keb. 683; *R. v. Jenkins*, 1 B. & C. 655; *R. v. Dugger*, 5 B. & Ald. 791; see *post*, Ecclesiastical Courts.

(n) Per Holt, C. J. Salk. 359.

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toms, excise or taxes, it is advisable to apply to this Court.(o) This Court also has peculiar power not only to *discharge*, if the imprisonment upon a criminal charge be wholly illegal, but also to *bail* the party, although in custody, for supposed high treason or capital felony.(p) But where the imprisonment is under the *civil* proceeding of any other Court, then the application for an habeas corpus may be more properly made to the Court out of which such process issued. The *practice* in obtaining an habeas corpus, or a more summary discharge from imprisonment, has been stated in the preceding volume.(q)

Awards.

So in order to enforce or to appeal against an *award* or *umpirage*, the statutes of 9 & 10 Wm. 3, c. 15, and 3 & 4 Wm. 4, c. 42, s. 39, 40, 41,(r) create a *summary* jurisdiction, in giving effect to, or setting aside, or modifying the decision of the arbitrator, constituted a private judge by the consent of the parties, and whether or not there has been any action depending, this Court has jurisdiction in cases where there has been *a written agreement that the submission to arbitration may be made a rule of this Court*, and the same has accordingly been made *such rule*. The proceedings in these cases have already been noticed.(s) When by the terms of the submission it has been agreed that it may be made a rule of this *or any other Court*, it will in general be found best to apply to this Court, because the very constant practice on these subjects has induced a particular facility of decision in K. B. The Court can also by attachment as effectually enforce specific performance of the award as a Court of Equity.(t) But we have seen that it has been considered, that when once the submission has been made a rule of any one of the Courts, an attachment cannot be moved for in any other Court, although one of the causes referred was depending in the latter.(u) And in general, if an agreement of reference has been made a rule of a Court of Law, a Court of Equity cannot give relief even on the ground of fraud, or other circumstance usually constituting the particular ground for proceeding in a Court of Equity.(v)

(o) See the instances and observations *Ex parte Pain*, 5 B. & C. 251; *Kite and Lane's case*, 1 B. & C. 101; 2 D. & R. 212; *In re Nunn*, 8 B. & C. 644; 3 Man. & R. 75; *Debell's case*, 4 B. & Ald. 243.

(p) 4 Inst. 71.

(q) *Ante*, vol. i. 691 to 696.

(r) See these acts set forth, *ante*, this volume, 80 to 85.

(s) *Ante*, this volume, 73 to 126.

(t) *Ante*, 122 to 124.

(u) *Ante*, 123, note (r); *Winpenny v. Bates*, 2 Crompt. & J. 379.

(v) *Auriol v. Smith*, 1 Turn. & Rus. 124 to 126; *ante*, this volume, 124, 125.

The legislature, in order to prevent the frauds and inconveniences so frequent in annuity transactions, has given each of the superior Courts *summary jurisdiction* in certain cases. The 17 G. 3, c. 26, now obsolete, was the first enactment; the act now in force is the 53 G. 3, c. 114. Sect. 2, requiring the *memorial* of the transactions, enacts, "that within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall after the 14th July, 1813, be granted for one or more life or lives, or for any term of years, or yearly estates determinable on one or more life or lives, a *memorial* of the date of every such deed, bond, instrument or other assurance, of the names of the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, and of the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery in the form *or to the effect following*, with such alterations therein as the nature and circumstances of any particular case may reasonably require, *otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes,*" and the form of the memorial in appropriate columns is then prescribed.

The 5th section gives a judge of K. B. or C. P. (omitting Exchequer and Courts of Equity) summary power, by summons and order, to compel the delivery of a copy of the deed to any applicant, and power to examine with the original.

Sect. 6 enacts, that if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same, or in case such consideration or any part of it shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid, or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods, or if the consideration or any part of it shall be retained on pretence of answering the future payments of the annuity or rent-charge, or any other pretence, in all and every the aforesaid cases it shall be lawful for the person by whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, *to apply to the Court in which any action shall be brought for payment of*

(x) See former act, 17 G. 3, c. 26, and present act, 53 G. 3, c. 141; 3 G. 4, c. 92; 7 G. 4, c. 75.

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the annuity or rent-charge or judgment entered, by motion to *stay proceedings* on the action or judgment; and if it shall appear to the Court that such practices as aforesaid, or any of them have been used, it shall and may *be lawful* for the Court to order every deed, bond, instrument, or other assurance, whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated.

The statute contains other enactments declaring void all annuities as to *infants*, and relative to extortion of annuity brokers, and exceptions with respect to annuities charged on property of adequate value, whereof the grantor was seised in fee, &c.

In considering the practical application of this statute, the distinction between the general jurisdiction of the Court over warrants of attorney, and the particular power given by the 6th section to the Court to interfere on summary motion, should be constantly kept in view. The first section declares the instruments *void* in cases where there ought to be, but has not been, a proper memorial; but that section gives the Court no power to interfere *summarily* to set aside any deed or instrument on account of a defect in the memorial; and, therefore, when *that* is the objection, although the deeds are void, yet no motion to the Court of Law can be made excepting to set aside a warrant of attorney, constituting one of the securities, and then that summary motion is founded principally upon the common law jurisdiction of the Court over warrants of attorney authorizing a judgment in that Court.(y) But when a case can by affidavits be brought within the precise terms of the 6th section, then a Court of Law has power (at least when an action is depending) to order the deeds and all other securities to be cancelled; but which enactment is not imperative, but *merely discretionary*, to vacate securities either absolutely, or on terms, according to the circumstances and justice of each case.(z) And even where too large a sum had been retained by the grantee's attorney with his knowledge, the Court refused to set aside the securities altogether, but referred the matter to the master to report what part of the sum charged for costs should be deducted.(z)

(y) Per Cur. 1 June, A.D. 1829, the Court said that they had no jurisdiction to interfere on motion to set aside deeds, except in the few cases mentioned in the 6th sect.; but the Court ordered the warrant of attorney to be delivered up; and see decision on 17 G. 3, Tidd, 522, note (f), and where the warrant of attorney authorized only a judgment in C. P., but by mistake a judgment had been

signed in K. B., the latter Court ordered the judgment to be set aside, but said they had no jurisdiction to order the warrant of attorney to be cancelled. 6 East, 241 a. As to the Common Law jurisdiction over warrants of attorney, post, 333, 6.

(z) *Girdlestone's case*, K. B. 24th June, 1829, MS.; and see 1 B. & C. 61; 4 B. & Ald. 281; 6 B. & Ald. 61; 1 Bing. 316.

In a late case in the Common Pleas, the Court refused to hear a rule for setting aside an annuity, because it appeared that it had not been *bonâ fide* obtained on behalf of the grantor himself, but of a third person, who had agreed to purchase the interest of the grantee, but attempted to raise the objection in order to get rid of his agreement. (*a*)

Courts of Equity have more extensive jurisdiction to cancel *annuity deeds* than a Court of Law, and therefore in some cases, especially those where the deeds constitute a cloud over or incumbrance upon an estate, it may be preferable to file a bill in a Court of Equity in the first instance, because, as we have seen, Courts of Law cannot order the deeds to be cancelled, excepting in the few instances enumerated in the sixth section, and are even then frequently reluctant to interfere. (*b*)

When a *legal* estate was originally conveyed by way of mortgage, or had become forfeited, the mortgagor, although ready and offering to pay the debt, had no relief in a Court of Law, but was compelled to resort by formal suit to a Court of Equity for an account, and to redeem, and which he could not do before the hearing in equity; (*c*) but now the statute (*c*) 7 Geo.

Mortgage-
deeds.

(*a*) *Fairecloth v. Gurney*, 9 Bing. 456.

(*b*) *Underhill v. Horwood*, 10 Ves.

218; *Holbrook v. Sharpe*, 19 Ves. 131;

1 Mad. Ch. Pr. 227, 228; ante, vol. i.

710. Besides a Court of Law has not by the act power to compel a reconveyance as a Court of Equity can.

(*c*) 7 Geo. 2, c. 20, "An Act for the more easy Redemption and Foreclosure of Mortgages."

Whereas mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained, and likewise commence suits in his Majesty's Courts of Equity to foreclose their mortgagors from redeeming their estates, and the Courts of Law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interests due on such mortgages and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a Court of Equity for that purpose, in which case likewise the Courts of Equity do not give relief until the hearing of the cause: For remedy thereof and to obviate all objections relating to the same, enacts that where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of his Majesty's Courts of Record at Westminster, or in the Court of Great Sessions in Wales, or in any of the Superior Courts in the Counties Palatine of Chester, Lancaster, or Durham, by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of his Majesty's Courts of Equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments, if the person or persons having right to redeem such mortgaged lands, tenement, or hereditaments, and who shall appear and become defendant or defendants in such action, shall at any time pending such action pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal, shall bring into Court where such action shall be depending all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity, upon such mortgage, (such money for principal, interest, and costs to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose,) the monies so paid to such mortgagee or mortgagees, or brought into such Court, shall be deemed and taken to be

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2, c. 20, affords mortgagors extensive *summary relief at law* upon bringing the principal money and interest into the Court in which the proceeding at law is depending, and upon affidavit and motion praying the Court to stay the proceedings of the mortgagee in *ejectment*, or even in an action of *covenant* or debt, on a *mortgage deed* or bond, (a) and by rule of Court compelling the mortgagee to reconvey and return the title-deeds; (b) and although the statute contains some exceptions, yet it is in general very liberally construed, so as to extend the summary relief at law and save the expense of a bill in equity to redeem. (c) But the third section of this act provides that it shall not extend to any case where the person against whom the redemption shall be prayed shall, by writing signed by him or his agent, insist before the mortgage-money has been brought into Court that the party praying a redemption has not a right to redeem, or that the mortgaged premises are charged with other money, or the right to redeem does not otherwise exist as stated in the act. The Court of Exchequer refused to interfere where the right to redeem was disputed upon affidavits, and it was held that this act was meant only to apply

in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgagor or defendant of and from the same accordingly, and shall and may by rule or rules of the same Court compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or reconvey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings, in his, her, or their custody, relating to the title of such mortgaged lands, tenements, and hereditaments unto such mortgagor or mortgagors who shall have paid or brought such monies into the Court, his, her, or their heirs, executors, or administrators, or to such other person or persons as he, she, or they shall for that purpose nominate or appoint.

Sect. 2 enacts, that on bills to foreclose, the Court, on the defendant's request, may proceed to a decree before a regular hearing.

Sect. 3. Provided always, that this act or anything herein contained shall not extend to any case where the person or persons against whom the redemption is or shall be prayed shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent, or solicitor, to be delivered before the money shall be brought into such Court at Law, to the attorney or solicitor for the other side,) insist either that the party praying a redemption has not a right to redeem or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side, nor to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit, nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer, any thing in this act contained to the contrary thereof in anywise notwithstanding.

This statute extends to mortgages where the principal is payable by instalments, *Hart v. Hosier*, 12 G. 1. And see *Bac. Ab. Mortgage*, E. 7; 1 Wils. 80; 8 T.R. 326, 410; 3 Bos. & P. 107; and other cases in Chitty's Col. Stat. 731, in notes.

(a) 7 Geo. 2, c. 20; *Anonymous*, 2 Chitty's Rep. 264; *Berthem v. Street*, 8 T. R. 326, 410; *Skinner v. Stacey*, 1 Wils. 80. And see other cases, *Tidd*, 1235, 1236.

(b) 7 G. 2, c. 20. And see cases Chitty's

Col. Stat. tit. Mortgage.

(c) *Ibid.*; 7 Ves. 489; 9 Ves. 36; *Goodtitle v. Bishop*, 1 Young & J. 344. But see *Goodtitle v. Pope*, 7 T. R. 185; and see cases Chitty's Col. Stat. 732, in notes.

to cases where the right to redeem is clear beyond all doubt; (d) but the Court of King's Bench, in construing this act and another statute containing a clause somewhat similar, fully investigated the grounds of opposition, saying that a mere colourable objection would not preclude the Court from affording relief, and adopted the same rule of construction of this very act in favour of a mortgagor. (e) If, however, it should appear in answer to the application that the mortgagor has legally and for adequate consideration agreed to convey his equity of redemption to the mortgagee, then the Court of Law will not in general interfere. (f)

The 4 Ann. c. 16, s. 20, as to *bail bonds*, and the 19 Geo. 2, c. 19, s. 23, as to *replevin bonds*, after authorizing the assignment of each from the sheriff and the assignee to sue in his own name, nearly in the same terms enable the Court in which the action thereon has been brought (and which must always be in the Court in which the process in the original action was returnable,) whether King's Bench, Common Pleas, or Exchequer, by *rule of Court*, and consequently on affidavit and rule nisi, "to give such relief to the parties upon the bond as is agreeable to justice and reason, and that such rule shall have the nature and effect of a defeazance to such bond." (g)

This Court (as well as Common Pleas and Exchequer) has an exclusive summary jurisdiction (as well of an equitable as of a legal nature (h)) over a *warrant of attorney*, authorizing a judgment in the particular Court, and all proceedings thereon, to entertain a motion to set the same aside if it authorize a judgment in that particular Court; and it has been usual to frame that security under seal, enabling certain attornies therein named, or any other attorney of a *particular Court*, to *appear in that Court* as attorney for the party, and to receive a declaration in an action, usually of debt, for a named sum at the suit of the creditor, and to confess such action, or suffer

Bail-bonds and
replevin-bonds.Warrants of
Attorney.

(d) Per Alexander, C. B.; *Goodtitle v. Bishop*, 1 Young & J. 344, and 1 Barnes, 121.

(e) MS.; and see *Rex v. Wrotesley*, 1 Bar. & Adol. 648, to shew that a mere colourable claim ought not to prevent the Court from affording summary relief.

(f) *Goodtitle v. Pope*, 7 T. R. 185.

(g) See the practice as to the relief on bail-bonds, Tidd, 298 to 305, and post; and as to replevin-bonds, Chitty's Col. Stat. tit. Landlord and Tenant, 676, in notes. The words of 4 Ann. c. 16, s. 20, are, "And the Court where the action is brought may by rule or rules of the same Court give such relief to the plaintiff and defendant in the original action, and to

the bail upon the said bond or other security taken from such bail, as is agreeable to justice and reason; and that such rule or rules of the said Court shall have the nature and effect of a defeazance to such bail-bond or other security for bail." The terms of 11 G. 2, c. 19, s. 23, are, "And the Court where such action shall be brought may by a rule of the same Court give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the effect of a defeazance to such bond."

(h) *Martin v. Martin*, 3 B. & Adol. 934; *Harrod v. Benton*, 8 B. & Cres. 217, not there cited.

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judgment by nil dicit or otherwise, to be entered up against the party, and also authorizing such attornies respectively to release any errors in the proceeding. Though not usual, it would be advisable to frame every warrant of attorney, to authorize a judgment or judgments in an action or actions in either of the Courts at Westminster, so as to afford the creditor the option of afterwards proceeding in which Court he might please. How or when this peculiar security for a debt, authorizing a creditor as it were, *per saltum*, to sign a judgment and issue execution, without even issuing a writ, (i) was first invented does not appear, but it has now become one of the most usual collateral securities on loans of money, or contracts to pay an annuity, and for debts, but usually accompanied with some other deed or security.

With respect to *form*, by particular rules of each of the Courts, (k) every person preparing a warrant of attorney, to be subject to a defeazance, ought to cause such defeazance to be written on the same instrument, or at least a memorandum of the substance, (k) but the defect only subjects the attorney to a motion, and does not vitiate the instrument. (l) It need not in strictness be under seal, though usually so, in order to authorize the release of errors. (m) It is further regulated by statute 3 G. 4, c. 39, for preventing frauds upon creditors by secret warrants of attorney, and requiring all such warrants, with affidavits of the time of executing the same, to be filed within twenty-one days after they have been executed, or the same are to be void against the assignees in case of bankruptcy; and by sect. 3, if the instrument is to be subject to a defeazance, the latter ought to be written on the same paper, or the instrument will be void; (n) but the decisions establish that, notwithstanding the express terms in the enactment, it is merely void as to creditors, and is not so as against the party himself. (o) The statute 6 G. 4, c. 16, s. 81 and 108, as to bankrupts, prevents any preference from being obtained by an execution founded on a warrant of attorney, unless the goods

(i) *Reeves v. Slater*, 7 B. & C. 486; *Badddeley v. Shafto*, 8 Taunt. 434.

As there has been no previous writ, it was therefore held that a warrant of attorney is not a suit within the meaning of 1 W. 4, c. 70; *Williams v. Williams*, 1 Crompt. & J. 387; and see *Jones v. Clark*, *ibid.* 447.

(k) R. M. 42 G. 3, K. B.; R. M. 43 G. 3, C. P.; R. M. 43 G. 3, Exc.

(l) *Shaw v. Evans*, 14 East, 576; *Partridge v. Fraser*, 7 Taunt. 307; *Tidd*, 546; *Bennett v. Daniel*, 10 B. & C. 500.

(m) *Kinnersley v. Mussen*, 5 Taunt. 264; *Brutton v. Burton*, 1 Chit. R. 707.

(n) *Dillon v. Edwards*, 2 Moore & P. 550.

(o) *Bennett v. Daniel*, 10 B. & C. 500, but *Parke, J. dissentiente*; *Aireton v. Davis*, 9 Bing. 740. So although the rule M. 42 G. 3 requires every attorney to write the defeazance on the instrument, his omission does not invalidate the instrument; *Shaw v. Evans*, 14 East, 576; *Partridge v. Fraser*, 7 Taunt. 307; *Simson v. Goode*, 2 B. & Ald. 568.

be seized upwards of two months before the commission or fiat; (p) and the 7 G. 4, c. 57, s. 32, 33, extends the like provisions to warrants of attorney executed by a person who becomes an insolvent debtor; (q) and since these acts, it is in general advisable to require the sheriff to assign goods under a fieri facias immediately after the seizure.

With respect to the form of warrants of attorney and cognovits, when executed by a *prisoner in custody on meane process*, the *general* rule of Hilary term, 1832, pl. 72, in order to protect such a prisoner from imposition, either as to the amount of the debt or costs, or the summary nature of the security, requires "the presence of an attorney on behalf of the prisoner, *expressly named by him, and attending at his request*, to inform him of the nature and effect of the instrument before he executes it, and *which attorney is to subscribe his name as a witness, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney.*" This rule of all the Courts in effect supersedes the prior distinct rules of each Court, which were nearly to the same effect. (r)

With respect to the time of signing judgment, the *general* rule for *all* the Courts of Hilary term, 1832, requires leave to enter up judgment on a warrant of attorney, above one and under ten years old, to be obtained by a motion in term, or by order of a judge in vacation; and if ten years old or more, then upon a rule to shew cause. (s)

As the nature of this security enables the creditor to sign judgment and issue execution *per saltum*, without affording the debtor any opportunity of pleading illegality or other objection, the Courts of King's Bench and Common Pleas, although varying in some respects in their practice on the subject, have always considered it necessary to control the security, by interfering on affidavit and motion to set it aside; and if the objection appear clear and unanswered, will set aside the

(p) But if the fiat be not issued within two months after the seizure, the execution is effectual; *Godson v. Sanctuary*, 4 B. & Adol. 255; 1 Nev. & Man. 52. S. C.

(q) *Sharpe v. Thomas*, 6 Bing. 416; *Cuming v. Welsford*, *ibid.* 502.

(r) R. E. 15 Car. 2, reg. 2, K. B.; R. E. H. 14 and 15 Car. 2, reg. 4, C. P.; R. E. 4 G. 2, K. B.; R. T. 14 and 15 G. 2, C. P.; see decisions on those rules, Tidd, 548 to 550. When executed by a prisoner, care must be observed that the attestation complies with the above rule, as thus, "Signed, sealed, and delivered by the said C. D. in the presence of me G. H., being an attorney of the Court of King's Bench, expressly named and re-

quested by the said C. D. to attend as his attorney at the execution hereof, and to witness his execution hereof as his attorney, and I having before the said C. D. executed the same, duly informed the said C. D. of the nature and effect of this instrument, and I subscribe this attestation as such attorney, and for the said C. D., and at his request, in pursuance of the rule of Court in that behalf." This rule is construed strictly, *Fisher v. Papa-nicholas*, 2 Crompt. & M. 215.

(s) See the antecedent and present practice and rules of Court still in force in Common Pleas and Exchequer, Tidd, 552 to 555.

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warrant of attorney, and all proceedings thereon; or if the facts be doubtful, they will either refer them to the master, who may receive further affidavits, or the Court will direct an issue, so that the truth may be tried by a jury; (t) and where the affidavits in support of and against a motion to set aside a judgment and execution on a warrant of attorney were very contradictory, on the question of fact, whether the defendant had executed that instrument, the Court of King's Bench directed an issue to try the fact. (u) Where a warrant of attorney was given to enter up judgment only in the Common Pleas, and judgment had by mistake been entered up in King's Bench, the latter Court set aside the *judgment*, but held that they had no jurisdiction to order the warrant of attorney to be vacated. (v) Motions to set aside this security form a considerable part of the business of this Court. In setting aside a warrant of attorney, the Court of Law combines the jurisdiction of a Court of Equity as well as of a Court of Law, so as to have power to interfere even on mere equitable grounds. And such an application may be made not only by the defendant who executed it, or his representatives, but also by a creditor or landlord, or other third party prejudiced by it. (x) And therefore where A. being indebted for rent to her landlord, the latter proposed to C., her son-in-law, to take his promissory note as security, and C. said he would give an answer in a week or ten days, and the landlord then asked him whether A. owed him any thing, and he replied that she did not, or what she did owe he considered as a gift, and within the ten days A. executed a warrant of attorney to C. upon which judgment was entered up, execution issued, and C. took possession of the goods: the Court, considering the representations and conduct of C. to have been intended to defraud the landlord, set aside the warrant of attorney at his instance. (x) The Court of Exchequer in one case refused to entertain a summary application to set aside a warrant of attorney on the ground of alleged illegality, considering that the application for such should be to the *equity side* of that Court, (y) but probably a different doctrine would now be entertained. (y)

A warrant of attorney authorizing a judgment to be entered in the Court of Common Pleas, seems in some respects a preferable security to a creditor than a warrant of attorney autho-

(t) *George v. Stanley*, 4 Taunt. 683.

(u) *Gurney v. Langlands*, 5 B. & Ald. 330.

(v) 6 East, 241 a; Tidd, 9th edit. 521.

(x) *Martin v. Martin*, 3 B. & Adol.

934; *Harrod v. Benton*, 8 B. & C. 217, not there cited.

(y) *Matthews v. Lewis*, 1 Anst. 7; 2 Man. Exch. Pr. 500, note (c); but a quære is added, and see *post*.

rizing a judgment in King's Bench, because in Common Pleas the Court will not interfere to set it aside on the ground of usury, &c. excepting upon just terms, viz. of paying the principal sum and legal interest actually due. (z) But the Court of King's Bench will, without imposing any terms, cancel a warrant of attorney, and set aside a judgment and execution thereon, upon the ground of usury, fraud, or other illegality, unless the party signing the warrant of attorney induced a third person to purchase the debt by representing it was legal or justly due. (a) If a creditor hold other securities besides a warrant of attorney, and apprehend that if he proceed on the latter the debtor will move to set it aside under pretence of usury or other illegality, and swear so strongly as to induce the Court to refer the matter to the master, and endanger the result, then it may be more advisable to bring an action on the covenant contained in the other security, because the defendant will not then be enabled to avail himself of his own oath or evidence, and a jury may not credit the defence; or if the defendant should suffer judgment by default, the Court would not afterwards interfere; so if the debtor's bankruptcy or discharge under the Insolvent Act be apprehended, then an adverse judgment in an action would be preferable to a judgment on a warrant of attorney, since the statutes 3 G. 4, c. 39, 6 G. 4, c. 16, s. 108, 1 W. 4, c. 38, as to bankrupts; and 7 G. 4, c. 57, s. 33, as to insolvents.

Each of the superior Courts, although it may not in other respects have any criminal jurisdiction, has a summary jurisdiction over all its own immediate officers, in compelling them to return excess of fees, or attaching them for any official misconduct; (b) and also over sheriffs, who are considered officers of the Court; (c) and by express statute, the Courts or a judge may, on petition, summarily by order punish gaolers, bailiffs, and others, employed in the execution of process, and who may have been guilty of extortion or other abuse in their office or place, and compel them to make reparation to the party in-

Officers of the
Court, sheriffs,
bailiffs, &c.

(z) *Semble*, Tidd, 9th edit. 547; *Hindle v. O'Brien*, 1 Taunt. 413; *Brown v. Holt*, 4 Taunt. 587; *Coke v. Brummell*, 8 Taunt. 439, in C. P. But in *Parsons v. Hinthorn*, C. P. 21 December, 1829, Tindal, C. J. seems to think such practice in C. P. incorrect; *Roberts v. Goff*, 4 B. & Ald. 92, 10 B.; *Archbold*, by T. Chitty, vol. ii. 496, note (c). It should seem that the practice in K. B. is the most sound, and that neither a Court of Law nor Equity ought to impose

terms when an act of parliament declares that a security shall be void on account of usury, &c. See *Barnard v. Young*, 17 Ves. 44.

(a) *Davison v. Franklin*, 1 B. & Adol. 142.

(b) Tidd, 57, 58; *Martin v. Bold*, 7 Taunt. 182; 2 Marsh. 487; *S. C. Sparrow v. Cooper*, 2 Bl. R. 1314; *Pater v. Croome*, 7 T. R. 336; *Wortley v. Palter*, 5 Taunt. 180.

(c) Tidd, 58.

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jured, and the costs of the complaint ;(d) and where a sheriff's officer, on arresting a party, received from him a larger sum than he was liable to pay as a caption fee, the Court of Exchequer on motion referred it to the master to ascertain the proper fee, and ordered the officer to restore the surplus, and pay the costs of the application,(e) although the party might have sustained an action at common law for the excess, or have sued for the penalty incurred by the extortion.(e)

By ancient *statutes* ignorant and unskilful attornies may be punished and prohibited from practising.(f) So an attorney, who is imprisoned, is prohibited from practising whilst in custody, and if he do, he may be struck off the roll.(g) And the 12 G. 1, c. 29, s. 4, enacts, that if any person, who has been convicted of forgery or perjury, or subornation of perjury or common barrettry, shall act or practise as an attorney or solicitor, or agent in any suit or action in any Court of law or equity in England, the judge or judges of that Court shall upon complaint or information thereof examine the matter *in a summary way in open Court*, and if the offence be established to the satisfaction of the judge or Court, he or they shall cause the offender to be transported for seven years as a felon.(h) So if an attorney practise for the profit of an unqualified person, he may be struck off the roll, and the unqualified person may be imprisoned for a year.(i) But the attorney may, after a time, on petition and satisfactory affidavit, be admitted, notwithstanding the strong terms of the act, that he shall be *for ever* afterwards disabled from practising as an attorney or solicitor.(k)

But independently of these and numerous other express regulations and penalties to which attornies and solicitors are subject, each of the Courts has summary jurisdiction over attornies of their own Court, when guilty of professional misconduct,(l) and this, although the malpractice was in an inferior

(d) 32 G. 2, c. 28, s. 11 ; and see *Ex parte Evans*, 2 Bos. & Pul. 88, as to the Court in which the application under this act must be made.

(e) *Watson v. Edmonds*, 4 Price, 309.

(f) Over ignorant and dishonourable attornies, 4 H. 4, c. 18; 32 H. 8, c. 30, s. 2; 5 J. 1, c. 7; 12 G. 1, c. 29; 2 G. 2, c. 23.

(g) 12 G. 2, c. 13, s. 9, against an attorney practising whilst a prisoner. *Whetham v. Needham and another*, Barnes, 44.

(h) This is one of the strongest instances of summary criminal jurisdiction that has ever been enacted.

(i) 22 G. 2, c. 46, s. 11; *In re Jackson and another*, 1 B. & C. 270; 3 Dowl. & R. 260, S. C.; *In re Garbatt*, 2 Bing.

74; 9 Moore, 157, S. C.; *Williams v. Jones*, 5 B. & C. 108; *Ex parte Whetton*, 5 B. & Ald. 824. *In the matter of Squire*, *infra*, n. (k).

(k) *R. v. Greenwood*, 1 Sir W. Blac. 222; but see *Ex parte Frost*, 1 Chitty's Rep. 538. However, in Easter term, 1830, Mr. Squire, who had been struck off the roll under this clause, for permitting an uncertificated conveyancer to serve process in the country for remuneration, was, on petition signed by very numerous practitioners and an affidavit, readmitted; and see *Ex parte Yates*, 9 Bing. 455.

(l) See in general *infra*, p. 33; Tidd, 87 to 90, 478; and 1 T. Chitty's Archbold, 40, 41; Archbold's Prac. C. P. edit. 1834, tit. Attornies, 16 to 24.

Court, as in the County Court. (*m*) Nor is it necessary that the misconduct should have been in the course of any suit; and it seems to be a general rule that when the employment of an attorney is so connected with his professional character, as to afford a presumption that he was employed in consequence of that character, the Court will interfere in a summary way to compel him to perform his duty, at least in accounting for and paying monies received by him for the use of the client; (*n*) and where an attorney in England had for many years acted as the agent of persons abroad, but for whom precisely, in consequence of several changes of parties by death, it did not appear, and he had received from the Prize Court in England large sums, without paying or accounting, this Court, upon affidavit and motion, referred the rule to Mr. Justice Bayley, who compelled the attorney to pay over the balance in hand, on receiving an adequate indemnity against supposed claims to be approved by the Master, although it was insisted that as the attorney had issued no process, and had acted only as agent, and not in any respect as an attorney of this Court, and as the real claimant was doubtful, the Court had no summary jurisdiction over him. (*o*) In a late case, where an attorney had received money to the use of his client, and not accounted for it, and had afterwards become bankrupt and obtained his certificate, the Court refused on motion to order him to repay the money so received, because the account was a debt barred by the certificate; (*p*) but declared that if the attorney had committed *fraud* in the receiving and not accounting, then the Court, in the exercise of its general jurisdiction over its officers, would have enforced such payment as a modification of the punishment, which it might otherwise inflict for his misconduct. But they considered that to deprive the attorney of the benefit of his certificate under the fiat against him, the case of *fraud* ought to be clear, and that the attorney should have notice, by the form of the rule, that the application was of a penal nature, and that it was not enough merely to require him by the rule to shew cause why he should not pay over the money. (*p*) If an attorney in that character, and with reference to a suit depending in Court, give an undertaking in writing to appear, or an undertaking to pay the debt and costs, as "I, the undersigned, agree to pay the debt and costs in this action, 16th July, 1830. John Green." the Court, of which he is an attorney, will on a summary application compel him to per-

(*m*) *Evans v. —*, 2 Wils. 382; 1 Bing. 91, 3. C.
In re Farmer, 3 Dowl. & R. 602. (*o*) *In re Woolf*, 2 Chitty's Rep. 68.
 (*n*) *In re Executors of Aitkin*, 4 B. & Ald. 47; *Ex parte Hall*, 7 Moore, 437; (*p*) *In re Bonner*, Gent. one, &c. 4 B. & Adol. 811.

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form it, although it were void by the statute against frauds, for not stating the consideration, in respect of which it was signed; (q) but it is the safest course *to apply to the Court* in which the attorney has been admitted, although the undertaking refer to a suit depending in another Court; (r) and it is obvious that an action for nonperformance of the undertaking would fail, and a summary application is the only course; though in cases *merely of negligence*, and not of want of integrity, the Court will not interfere summarily; and will leave the party complaining to his action. (s) We have seen that a Court of Equity will by injunction prevent an attorney from being concerned or acting against his former client, in a matter where his previous employment for the client afforded him important information, which he might subsequently use materially against such client, (t) and a Court of Law appears to possess the like jurisdiction, though it will not be exercised, unless it be shewn that there is strong ground to expect that the attorney will abuse the confidence formerly reposed in him. (u) It was held recently (A.D. 1832) in the Exchequer, that the Courts have at common law an inherent jurisdiction independently of 2 G. 2, c. 23, s. 23, to tax the bills of attornies practising therein, and therefore may refer to taxation, without imposing the terms of undertaking to pay; (x) but in the last case in King's Bench (A.D. 1833) the contrary was decided. (y) All the Courts exercise summary jurisdiction over questions between attornies and their artieled clerks, in compelling a return of a part of the premium and otherwise. (z)

Imperative judgment by default in proceedings for costs of election petitions by 9 G. 4, c. 22.

Whilst noticing these principal instances of summary jurisdiction given by particular statutes, it may be proper to notice an instance, somewhat of summary and peculiar jurisdiction, connected with the practice of elections. The 9 G. 4, c. 22, s. 57 & 63, contains enactments under which costs incurred by opposing a petition against the return of a member of parliament, may be recovered against any one of several persons, who have signed it; and the act declares that the certificate

(q) *Evans v. Duncombe*; and *In re Greaves*, 1 Crompt. 372 to 376; and see *Hall v. Ashurst*, 3 Tyr. 420.

(r) *Ibid.*; and *In re Greaves*, 1 Crompt. & J. 374, note (a).

(s) *Ante*, 33; *Tidd*, 86; *Beal v. Langstaff*, 2 Wils. 371; *In re Laurence*, 2 Moore, 665; *Short v. Pratt*, 7 Moore, 424; 1 Bing. 102, S. C.; *Ex parte Brooks*, 1 Bing. 105; *Pitt v. Yalden*, 4 Burr. 2060; *In re Jones*, 1 Chitty's Rep. 651, 652; *R. v. Tew*, Sayer, 50; *R. v.*

Bennet, *id.* 169.

(t) *Ante*, vol. i. 705, 706, 714.

(u) *Grissell v. Peto*, 9 Bing. 1; *Johnson v. Marriott*, 2 Crompt. & J. 183.

(x) *Watson v. Postaw*, 2 Tyrw. 406.

(y) *Clutterbuck v. Combes*, 5 B. & Adolp. 460; see *post*, Chancery.

(z) *Tidd*, 68; 1 Archb. K. B. by T. Chitty, 16; *Ex parte Bagley*, 9 B. & C. 691; 2 Barnardiston's R. 227, 231; *Ex parte Promkind*, 3 B. & Ald. 357; 1 Chit. R. 691.

of the Speaker of the House of Commons as to the amount of costs, shall be conclusive evidence of the amount of the claim for costs, and shall have the force and effect of a warrant of attorney to confess judgment, and the superior Courts at Westminster, or rather that in which the action for the costs shall be commenced, shall give effect to the certificate accordingly. This very singular enactment certainly affords a more summary proceeding for such costs than by the intervention of a jury, as at common law. (z)

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At common law the Courts of law would in general in a degree protect *their own officers*, when acting bona fide in executing the process of the Court, (as a sheriff acting in obedience to a writ of fieri facias,) from the risk of double liability to two different claimants, as where he had seized goods under a writ of fieri facias, provided he applied to the Court as soon as he found himself in peril; as if upon such seizure he had notice that the party, whose goods he had taken, had committed an act of bankruptcy, and that assignees claimed the property, or there was a reasonable doubt whether the goods were not liable to an extent of the crown, the Court would enlarge the time for returning the writ, when ruled by the plaintiff to do so, until he or the assignees had indemnified him or had inter se settled their mutual claims, (b) and would compel the adverse claimant to try the right, whilst the proceeding against the sheriff or officer was suspended, or upon the terms of his bringing the proceeds into Court to abide the result. At common law this was the only mode of relief to the sheriff, who had seized goods in settlement, for he could not then file a bill of interpleader, because, as observed by Lord Eldon, "A person could not file a bill of interpleader, who was obliged to put his case upon this, that as to some of the parties he might be a wrongdoer, as by the seizure and temporary detention of the goods;" (c) for the same reason the Court of King's Bench, on the motion of an *auctioneer*, who had, before notice of any third person's claim, sold under an execution by the direction of the sheriff, gave him leave to bring the proceeds into Court, with a stay of actions against him. (d) But when the sheriff

3dly, In furtherance of the Court's own jurisdiction and of the extension of jurisdiction of the Courts of law by the *Interpleader Act*, 1 & 2 W. 4, c. 58, s. 6. (a)

Relief to sheriffs.

(z) See 9 G. 4, c. 22; and *Gurney v. Gordon*, 2 Tyr. 616.

(a) As to bills of interpleader in equity see Chit. Eq. Dig. Pleading, 780; Practice, 894, 1110; 1 Mad. Ch. Pr. 173 to 182; *post*, Chancery.

(b) See decisions at common law, *Wells v. Pickman*, 7 T. R. 174; *M'George v. Burch*, 4 Taunt. 585; *R. v. Briden*,

7 Taunt. 294; 1 Moore, 43; 2 Chit. R. 204, and other cases; Tidd, 620, note (q), 1017, 1018; *id.* Suppl. 183; 2 Arch. by T. Chitty, 759 to 761; but see *Hartley v. Stoad*, 8 Moore, 466; *Saunders v. Sheriff of Middlesex*, 3 B. & Ald. 95; *Etchells v. Lovatt*, 9 Price, 54.

(c) *Slingsby v. Boulton*, 1 Ves. & B. 334.

(d) MS.

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of Hertfordshire by his under-sheriff hastily returned on writs of *fieri facias*, that he had seized goods, and they remained on hand for want of buyers, the Court of King's Bench refused leave to amend his return on affidavit that writs of extent had since been received for sums exceeding the value of such goods, because he ought to have made more diligent inquiry before he returned the writ. (e) This interference at *common law* was improved and extended by 1 & 2 W. 4, c. 58, s. 6, which, after reciting that difficulties sometimes arise in the execution of process against goods and chattels issued by or under the authority of the said Courts, by reason of *claims* made to such goods and chattels by *assignees of bankrupts*, and *other persons*, not being the parties against whom such process had issued, whereby *sheriffs* and *other officers* are exposed to the hazard and expense of actions, and it is reasonable to afford relief and protection *in such cases* to such sheriffs and other officers, therefore enacts, "That when *any such claim* shall be made to any goods or chattels taken or intended to be taken in execution, under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court, from which such process issued, upon application of *such sheriff or other officer*, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them by rule of Court as well the party issuing such process as the party *making such claim*, (f) and thereupon to exercise for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities *hereinbefore contained*, (g) and make such rules and decisions as shall appear to be just, according to the circumstances of the case, and the *costs* of all such proceedings shall be in the discretion of the Court." If the sheriff have accepted the indemnity of a third person, (h) or has paid over the proceeds to the judgment creditor, (i) he will not be relieved under this act. And the application must be at the first opportunity, and the affidavit positively deny collusion. (k) Where in consequence of a claim by assignees to goods taken by a sheriff under a *fi. fa.*, the latter applied to

(e) MS. A. D. 1818; but see *Rutson v. Hatfield*, 3 B. & Ald. 204, *contra*; and see *Anderson v. Calloway*, 1 Crompt. & M. 182; *Cook v. Allen*, *id.* 542.

(f) *Seem*, that this act extends to every claim, whether at law or in equity, and renders doubtful the accuracy of *Sturges v. Claude*, 1 Dowl. Rep. 505.

(g) Refers to sections 1, 2, 3, 4, 5,

which see *infra*.

(h) *Tucker v. Morris*, 1 Crompt. & M. 73.

(i) *Anderson v. Calloway*, 1 Crompt. & M. 182; 3 Tyrw. Rep. 237, S. C., by name of *Chalon v. Anderson*; and see *Saunders v. Sheriff of Middlesex*, 3 B. & Ald. 95.

(k) *Cook v. Allen*, 1 Crompt. & M. 542.

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the Court and obtained relief according to this act, it appears to have been considered that the Court could not allow the sheriff the costs of necessary possession, but merely suffered him to withdraw from the possession in case the plaintiff in the execution did not appear to the rule. (l) But when a sheriff had taken goods in execution, and on an adverse claim being made to them, obtained a rule under the 6th section of this act, to which the claimant did not appear, the Court barred the claim and ordered the party, who had made such claim, and thus abandoned the same, to pay the execution creditor his costs of shewing cause against the rule, unless cause should be shewn by the claimant in six days from service of such order; (m) but no costs were allowed to the sheriff, which is a hardship, requiring relief. (n) In a late case where goods had been taken by the sheriff under a fi. fa. and sold by him, and another fi. fa. having been issued in the mean time against the same goods, and another party claimed title to the property against the defendant and the sheriff, and complained that the goods had been sold improvidently and in spite of notice from such claimant, the Court of King's Bench made an order under the act, protecting the sheriff from such multiplied liability upon proper terms. (o)

Excepting in the case of a *sheriff* and of a seizure under process, a person sued for a debt or for goods, and being a stockholder, bailee, or agent, although he claimed no interest or benefit in the subject in dispute, could not have any relief at law, and was obliged to file a bill of interpleader in a Court of Equity at great trouble and expense. (o) The statute 1 & 2 W. 4, c. 58, remedies, to a certain extent, this evil, and whilst it makes considerable inroad on the prior exclusive jurisdiction of a Court of Equity, greatly enlarges the jurisdiction of all the Courts of Law at Westminster, and of the Common Pleas at Lancaster, and Court of Pleas at Durham. The first section, after reciting that it often happens that a person sued at law for the recovery of *money or goods*, (p) wherein he has no interest, and which are also *claimed of him by some third party*,

Relief at law in other cases under the interpleader act, 1 & 2 W. 4, c. 58.

(l) *Field v. Cope*, 2 Tyr. Rep. 458.

(m) *Perkins v. Benlow*, 3 Tyr. Rep. 51. This decision appears to be analogous to the practice in equity on an interpleader bill of making the unsuccessful claimant pay the costs his false claim occasioned.

(n) *Slowman v. Bach*, 3 B. & Adol. 103.

(o) 7 Term R. 174; Smith's Ch. Pr. 351 to 358; 1 Madd. Ch. Pr. 173 to 182;

Chit. Eq. Dig. Prac. XIV., Bill of Interpleader, 894, 1110, and *post*.

(p) This recital shews that it was the intent of the legislature to confine the remedies given by the act to *money demands and claims on goods*; but, as observed in 2 Dowl. Stat. 570, there seems to be no reason why the act does not extend to *trespass for goods or to covenant for rent, &c.*

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has no means of relieving himself from such adverse claim but by a suit in equity against the plaintiff and such *third party*, usually called a *Bill of Interpleader*, which is attended with expense and delay; for remedy thereof enacts, that upon application, made by or on behalf of any defendant, sued in any of his Majesty's Courts of Law at Westminster, or in the Court of Common Pleas in the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, *in any action of assumpsit, debt, detinue, or trover*, such application being made *after declaration and before plea*, by *affidavit* or otherwise, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who *has sued or is expected to sue* for the same, and that such defendant *does not* in any manner *collude* with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action in such manner as the Court (or any judge thereof) may order or direct, it shall be lawful for the Court, or any judge thereof, to make rules and orders calling upon *such third party* to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of *such third party as of the plaintiff*, and in the meantime to *stay the proceedings* in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more *feigned issue or issues*, (q) and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to *costs* (r) and all other matters as may appear to be just and reasonable. (s)

(q) See an instance of such feigned issue, *Dixon v. Yates*, 3 B. & Adolp. 313.

(r) In equity, the plaintiff in a bill of interpleader properly filed is entitled to costs out of the fund, *Campbell v. Solomons*, 1 Sim. & Stu. 462; and *semble*,

the practice is the same under this section, though the party ultimately unsuccessful must repay the amount, *Ducar v. Mackintosh*, 3 Moore & S. 174; *Cotter v. Bank of England*, *id.* 180.

(s) The act also contains the following sections:—Sect. 2 enacts, that the judgment in any such action or issue as may be directed by the Court or judge, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them. Sect. 3 enacts, that if such third party shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors, or administrators, saving nevertheless the right or claim of such third party against the plaintiff,

As the proceedings under this statute, as well in relief of sheriffs as of other persons, are in many respects analogous to and in lieu of the remedy in equity by a bill of interpleader, it will frequently, at least in doubtful cases, be expedient to examine the practice and decisions in Courts of Equity upon such a bill. (t) It has been supposed that this act does not extend to equitable claims, but the relief is not in terms restrained to legal claims. (u) The act does not take away the right of a party to file a bill of interpleader, for the remedy is merely concurrent; though if a sheriff or stakeholder have filed such a bill, then, having made his election, the Common Law Courts will not interfere. (u) A party who has paid over the proceeds to the execution creditor, (x) or has so connected himself with one of the claimants as to accept his indemnity, will not be relieved under this act; (y) nor will the Court always interfere in favour of a person who has unnecessarily and officiously subjected himself to the double risk; (z) and with analogy to the practice in equity on bills of interpleader, a party who still in-

and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable. Sect. 4 provides, that no order shall be made, in pursuance of this act, by a single judge of the Court of Pleas of the said County Palatine of Durham who shall not also be a judge of one of the said Courts at Westminster, and that every order to be made in pursuance of this act by a single judge not sitting in open court shall be liable to be rescinded or altered by the Court, in like manner as other orders made by a single judge. Sect. 5 provides also, that if upon application to a judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court, and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court instead of the order of a judge. Sect. 7 enacts, that all rules, orders, matters, and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause, (if any) be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order so entered shall have the force and effect of a judgment (except only as to becoming a charge on any lands, tenements, or hereditaments,) and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent, or attorney, execution may issue for the same by fieri facias or capias ad satisfaciendum adapted to the case, together with the costs of such entry and of the execution, if by fieri facias, and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation, and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court.

(t) See in general Chit. Eq. Dig. Pleading, 780 *id.* tit. Practice, 894, 1110; 1 Madd. Ch. Pr. 173 to 182, and *post*, Chancery.

(u) *Sturgess v. Claude*, 1 Dowl. R. 505; Tidd. Supp. 190; but note the report of that case does not distinctly shew the ground of decision by the single judge; why ought not a sheriff to be protected at law, unless he has made his election by filing a bill of interpleader? In general a bill of interpleader is sustainable, though the demand of one claimant is of

a legal nature and the other of an alleged equitable right, *Morgan v. Morsack*, 2 Merivale's R. 111; 1 Madd. Ch. Pr. 173, 174. If so, the case in 1 Dowl. R. 505, as reported, is not correct; but see *Barclay v. Curtis*, 9 Price, 661.

(x) *Anderson v. Galloway*, 1 Crompt. & M. 182; 3 Tyr. R. 237, S. C.

(y) *Tucker v. Morris*, 1 Crompt. & M. 73; 1 Dowl. R. 639, S. C.

(z) *Belcher v. Smith*, 9 Bing. 82; 2 Moore & S. 184, S. C.

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sists on a lien, and therefore is himself a claimant. will not be relieved, (a) unless the lien were of such a nature that it must have been satisfied by the successful claimant, whichever party he might be, and the party applying for relief limited his claim to such lien. (b) Where goods consigned to A. were housed at the London Docks, and were claimed by B., and the dock company required an indemnity of A., the original consignee, before delivering them to him, and A. refused, and brought an action of trover with counts for special damage for the detention; on motion by the company for relief under the interpleader act, 1 & 2 W. 4, c. 58, B., upon due notice, not appearing, the Court held that the claim of B. against the company was barred, but that A. ought not to be precluded from recovering for his special damage, if any; (c) the rule therefore was that on the defendant's undertaking to deliver up the wine, then if A. should accept the same the action should be discontinued on payment of costs by the defendants; but if A. should go on with the action the count in trover should be struck out, and A. proceed for the special damage only. (c)

As the statute in express terms is limited to summary interference in actions of *assumpsit*, *debt*, *detinue* and *trover*, many cases will arise when the act will not apply, and when it will still be necessary to apply to a Court of Equity for relief. (d) Frequently a plaintiff has an election to proceed in an action of *trespass* or of *trover*, and if he wish to avoid a summary application under the interpleader act, he may do so by issuing his writ and declaring in *trespass*. So by declaring in *covenant* on a lease instead of *debt*, it would seem doubtful whether the Court could interfere under the terms of that act, and *case* and *replevin* are certainly not actions within the act.

Another modern improvement in the administration of justice in Courts of Law has been introduced in invasion of the previous exclusive jurisdiction of Courts of Equity, by the statute, 1 W. 4, c. 22, giving an absolute power to examine witnesses on interrogatories *without consent*. Before that act there was no power *at law* to *compel* consent to a commission or to the examination of witnesses upon interrogatories, (e) though the Court would put off the trial at the instance of the defendant,

Extension of jurisdiction of the superior Courts of Law by enabling them to issue commissions and to examine witnesses on interrogatories under 1 W. 4, c. 22.

(a) *Braddick v. Smith*, 9 Bing. 84; 4 Moore & S. 131, S. C. Same rule in equity, see *Mitchell v. Hayne*, 2 Sim. & Stu. 63.

(b) *Id. ibid.*; *Cotter v. Bank of England*, 3 Moore & S. 180; see the Practice Tidd, Sup. 1833, p. 162 to 315; Chapman's Addenda to his Practice, 162; 2 Arch. K. B. by Chitty, 758.

(c) *Lucas v. London Dock Company*, 4

B. & Adolp. 378.

(d) See *post*, Court of Chancery.

(e) Per Bolland, B. in *Bucket v. Williams*, 1 Tyrw. R. 504; 3 Bla. Com. 382, 383, 438, 449; Tidd, 485 (g), 810, note (h), (i), 811; Tidd's Supp. 158, cites 2 Rep. C. L. Comm. 23, 24, 73, &c.; 4 Taunt. 46; 2 Chitty's R. 179; Cowp. 174; 2 Dowl. Stat. 43, note (d).

if the plaintiff would not consent; (f) and if the defendant refused, the Court would not allow him to sign judgment as in case of a nonsuit. (g) The Court of Exchequer, however, would grant a commission to examine a witness who was in this country, on an affidavit of his being under the necessity of going abroad before the day of trial, although the cause were not at issue and the answer had not come in. (h) In cases where it was important to proceed to trial, and the opponent refused to consent to examine witnesses abroad, it was formerly absolutely necessary, excepting as above in the Exchequer, to proceed in a Court of Equity, in order to obtain a commission for the examination of such witnesses, and for which purpose it was necessary to institute a new suit by filing a bill praying a commission and that defendant should be decreed to consent as auxiliary to the suit at law. (i) But now by 1 & 2 W. 4, sess. 2, c. 22, all the superior Courts or a judge has an absolute power of ordering an examination of a witness upon interrogatories if within the jurisdiction of the Court, or of ordering a writ in the nature of a *mandamus* or *commission* for the examination of the witness if he be out of such jurisdiction.

The first section, after reciting that "whereas great difficulties and delays are often experienced, and sometimes a failure of justice takes place in actions depending in Courts of Law, by reason of *the want of a competent power and authority in the said Courts to order and enforce the examination of witnesses*, when the same may be required before the trial of a cause; and whereas by an act passed 13 G. 3, intituled An Act for the establishing certain Regulations for the better Management of the Affairs of the *East India Company*, as well in India as in Europe, certain powers are given and provisions made for the examination of witnesses in *India* in the cases therein mentioned, and it is expedient to extend such powers and provisions, therefore enacts, that all and every the powers, authorities, provisions and matters contained in the said recited act relating to the examination of witnesses in *India*, shall be and the same are hereby extended to all colonies, islands, plantations and places *under the dominion of his Majesty in foreign parts*, and to the judges of the several Courts *therein*, and to all actions depending in any of his Majesty's Courts of Law at Westminster, *in what place or country soever the cause of action may have arisen*, and whether the same may have arisen

(f) Cowp. 194; Doug. 419; 1 Bos. & Pul. 210.

(g) Tidd, 811.

(h) 1 Price, 449, 381.

(i) 2 Rep. C. L. Com. 234—73; 5

Bla. Com. 382, 383, 438, 449; Tidd, Sup. 158; 2 Mad. Ch. P. 405; see the cases as to bills for commissions to examine witnesses, Chit. Eq. Dig. Practice, p. 1017 to 1024.

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within the jurisdiction of the Court, to the judge whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for. (*k*)

Although the 1st section of this act in terms seems only to authorize a commission to be executed in some place part of the British dominions, the 4th section is general, so that since this act a commission may issue to examine witnesses in *France or any other place* out of the common law jurisdiction of the Court, on motion in that Court of law in which the action shall be depending (*l*). The examination of witnesses on interrogatories, under this act, is discretionary, and the party *may* still be allowed the expenses of bringing over witnesses from abroad and maintaining them here, in order that they may be examined in Court *viva voce*. (*m*)

No compulsory discovery, except in summary proceedings; and of the ineffectual attempt to establish such compulsory power now exclusively exercised by Courts of Equity.

In the instances in which the Courts of Law permit summary application as against attornies, and in cases of awards, annuities, mortgages, bail bonds, replevin bonds and other cases before noticed; the proceeding of the applicant is by filing affidavits, on which he founds his motion, and obtains a rule nisi; and this proceeding in effect operates somewhat like a bill in equity

(*k*) It is clear from section 4, that this act (as did the 13 G. 3, c. 63, s. 45,) extends to applications as well by a *defendant* as of a *plaintiff*, *Grillard v. Hogue*, 1

Brod. & Bing. 519; 2 Dowl. Stat. 42, note (*a*). The act also contains the following sections:—

SECT. 2 enacts, That when any writ or commission shall issue under the authority of the said recited act, or of the power hereinbefore given by this act, the judge or judges to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses as the Court whereof they are judges does or may possess for that purpose in suits or causes depending in such Court.

SECT. 3 enacts, That the costs of every writ or commission to be issued under the authority of the said recited act, or of the power hereinbefore given by this act in any action at law depending in either of the said Courts at Westminster and of the proceedings thereon, shall be in the discretion of the Court issuing the same.

SECT. 4 enacts, That it shall be lawful to and for *each of the said Courts at Westminster*, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, *in every action depending in such Court*, upon the application of *any of the parties* to such suit,* to order the examination on oath upon interrogatories or otherwise before the master or prothonotary of the said Court or other person or persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath *at any place or places out of such jurisdiction* by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place and manner of such examination, *as well within the jurisdiction of the Court wherein the action shall be depending as without*, and all other matters and circumstances connected with such examination, *as may appear reasonable and just*.†

(*l*) *Duckett v. Williams*, 1 Tyrw. Rep. 502; and other cases cited; see further as to the practice, *Tidd Sup. A.D. 1833*, p. 162 to 167; and 1 Archb. K. B. by

Chitty, 250; 1 Archb. C. P. [96], 150.

(*m*) *Mucalpine v. Poyles*, 3 Tyrw. R. 871.

* *Grillard v. Hogue*, 1 Brod. & Bing. 519.

† Then follow seven other sections relative to the proceedings.

praying a discovery, but with this difference, that in equity the party must make the required disclosure or be committed for his contempt; but at law the party shewing cause need not absolutely make an affidavit, but may decline to shew cause and let the rule be made absolute without discussion, or he may rely upon the affidavits of third parties. In general, however, if the affidavits of the applicant charge some particular transaction by or with the privity of the opponent, then unless he make affidavit denying such allegation, the matter will be taken *pro confesso* against him; so that in general a rule nisi at law operates as a bill of discovery, and compels him on his oath to state the facts at the peril of an indictment for perjury, if the applicant and another person can distinctly swear to the converse. Lord Wynford attempted to introduce an act containing clauses enabling Courts of Law to examine the parties themselves, whether plaintiff or defendant, relative to the right of action or defence; but the bill was thrown out as too strong a measure, tending to destroy the boundaries between legal and equitable jurisdiction. (n)

The foregoing, it will be observed, are proceedings *to extend* the jurisdiction of the King's Bench and other Courts of Law, by affording summary assistance in such Courts. But moreover the Court of King's Bench, and indeed equally so the other superior Courts of Law, claim and exercise a very useful and extensive legal and equitable jurisdiction over the proceedings in their own particular Court, so as to prevent their *misapplication*, (however correct and legal in themselves according to the general jurisdiction and practice of each Court,) or perversion or abuse, by which they might, if permitted, become the engines of malice and vexatious oppression or litigation. Thus, besides the proceeding by prohibition to prevent a suit in *another* Court that has no jurisdiction, if a plaintiff vexatiously institute two or more actions or proceedings at the same time and with the same object in different Courts, although one Court has no direct power to issue a prohibition or interfere with the proceeding in the other Court when the latter has jurisdiction, yet each Court can effect the same object, by granting a rule in the action depending in its own Court, calling on the plaintiff to shew cause why he shall not either abandon the action in the other Court, or submit to have the proceedings in this Court stayed; (o) which

Summary application to prevent the abuse of the authority of the Court or other vexatious proceeding.

(n) The consequence is, that just claims for *small debts* must be frequently abandoned, when it would not be worth the

expense of filing a bill of discovery.

(o) *Miles v. Bristol*, 3 B. & Adol. 945.

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proceeding saves the necessity for the expense, and risk of a *plea* that another action is pending for the same cause. But where an application was made to the Court of Common Pleas to stay proceedings in an action, on the ground that a former action for the same cause had been referred to an arbitrator by a rule of Court, and by which the plaintiff was precluded from bringing a new action, that Court refused the application. (o) We shall hereafter, when considering motions to stay proceedings, examine the summary jurisdiction of the Courts of Law to interfere in these and other cases, and what is the redress when the jurisdiction has been abused.

Civil jurisdiction in aid of the civil jurisdiction of other Courts, or in compelling them to act, or restraining them from acting, or from acting improperly, and on appeal from their decision.

This Court has extensive jurisdiction as well in *aid of other Courts* and jurisdictions, as in *compelling* them to act when they improperly refuse to do so, or in *restraining* them from acting when they have no jurisdiction, or exceed or abuse it, or in correcting their judgments or proceedings by *writ of error* or *false judgment*, or on *certiorari*.

Of the first description are the instances of this Court receiving and hearing arguments upon a *Case* stated by a Court of Equity, and certifying their opinion for the assistance of the judge of the Equity Court; or trying an issue directed by a Court of Equity, or by some act of parliament; or enforcing the judgment of an inferior Court by *certiorari*, and issuing execution from this Court; of the *second* description are the proceedings by *mandamus* to inferior Courts and officers of a public nature; of the *third*, are writs of *prohibition*; and of the last, are writs of error or *false judgment*, or removal of the proceedings by *certiorari*, and more summarily examining their sufficiency, or giving them effect.

Right of Courts of Equity to send a case to a Court of Law for opinion. (p)

The Court of Chancery, (q) the Master of the Rolls, and the Vice-Chancellor, (r) respectively have power to direct a *Case* with appropriate questions of *law* to be stated, and sent to one of the superior Courts of *Law* for the opinion of the judges; (s) and which in substance is in the nature of a *Special Case* stated after a trial at law, or under the excellent recent provision

(o) *Dicas v. Jay*, 6 Bing. 519, *sed quere*: and see *post* as to staying proceedings.

(p) See in general 2 Madd. Chan. Pr. 474; *id.* 2d ed. 335; Newl. Chan. Pr. 131, 336; Chit. Eq. Dig. tit. Practice, l. iii. p. 1066 to 1073.

(q) *Wheeler v. Duke*, 3 Tyr. R. 61.

(r) *Wingfield v. Thorp*, 10 B. & C.

785.

(s) *Duintry v. Daintry*, 6 T. R. 313. But this is only when the case has been properly stated, *Parsons v. Parsons*, 5 Ves. 578; 1 Dougl. 344, n. And a case cannot be sent by the Committee of Appeals of the Privy Council for the opinion of the Courts of Law, *ibid.*

in the 3 & 4 W. 4, c. 42, s. 25. (t) The judges of the Court to which such case has been sent, after hearing counsel upon each side, respectively sign and return their certificate, concisely stating their joint opinion, but without assigning any reasons. (u) The opinion of the Court of Law may be thus obtained when the facts have already been found, or are admitted, without an issue or finding of a jury. (u) But this proceeding is merely for the information of the equity judge, and he is not bound by the opinion of the Court of Law. (x) Nor are Courts of Law bound to answer a speculative question, and, therefore, the case stated for their opinion must set forth the terms of the conveyance that may raise the question, not a mere speculative abstract question, (y) and the Court of K. B. declined to answer a case from the Rolls stated as a *trust*; (z) and more recently the Court of Exchequer declined to decide on a question arising on an issue directed to it out of Chancery, and which involved a right merely equitable, particularly where the rules of law and equity differ on the question. (a) Where there has been a reference to the judges on a case stated, no writ of error lies on their judgment; though if they certify their reasons, they may re-consider their decision. (b) In general if the Chancellor or other equity judge should be dissatisfied with the opinion of the Court of Law on a case thus stated, he may cause the same case to be sent to another Court of Law, there being but one instance of sending back a case for review to the *same* Court. (c) On a case sent from Chancery into C. P., the latter Court ought not to give an opinion on any other than the question put by the Chancellor. (d) From the equity side of the Court of Exchequer the stating a case for the opinion of the Court, of which the chief baron is the presiding judge at law as well as in equity, would be *ab eodem ad idem*, and, therefore, in a degree less useful. (e) In consequence of the pressure of business in the Court of King's Bench, it has of late been more usual to send the cases from equity to the Court of Common Pleas, or to the

(t) And yet before that enactment an attorney was fined for fabricating a case, though by consent, *In re Elsam*, 3 B. & C. 597.

(u) See the cases Chit. Eq. Dig. tit. Practice, L. iii. p. 1066 to 1073.

(x) *Maxwell v. Ward*, 11 Price, 18; *Lansdown v. Lansdown*, 2 Bligh, 60.

(y) *Bliss v. Collins*, 1 Jac. & W. 426.

(z) *Parsons v. Parsons*, 5 Ves. 578; and see *Yates v. Hambly*, 2 Atk. 363;

2 Mad. Chan. Pr. 477.

(a) *Johnson v. Johnson*, 3 Tyr. R. 73, and *id.* 83, where see the form of certificate in part, and declaring opinion as to the residue.

(b) *Gore v. Gore*, 9 Mod. 5.

(c) *Trent v. Hanning*, 10 Ves. 495, 506; *Uttersson v. Vernon*, 3 T. R. 539; 4 T. R. 570, S. C.; Newl. Chan. Pr. 181.

(d) *Morgan v. Horseman*, 3 Taunt. 245.

(e) 2 Madd. Chan. Pr. 474.

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Exchequer. (f) When it is considered that cases are thus sent by Courts of Equity to Courts of Law merely with a view to assist the former, and that the opinions of the judges of the Courts of Law are not obligatory, it would seem that the form of the assistance by a mere concise answer, without stating any principle or assigning any reason in the certified decision, is but little calculated to afford the desired assistance, especially as the equity judge is not present at the hearing. In fact, however, the most liberal and explanatory communications are privately made to the equity judge if he so require. It might be desirable if the superior Courts of Law had a corresponding right to require the formal opinion of the judge of a Court of Equity in cases where the rules or practice in equity may be doubtful. But no such right exists, though in all the judicial departments there is a most liberal disposition to afford full information respecting the practice of each Court, and the principles upon which the same is founded.

Trial of Issue in fact directed by a Court of Equity or by a statute.

Courts of Equity have long exercised a jurisdiction extremely beneficial to suitors, of directing an *issue* upon some matter of *fact* to be tried in a Court of Law, when in the course of a suit otherwise properly instituted in a Court of Equity an intricate or difficult question of fact arises; and with directions sometimes that the parties to the suit may themselves be examined, instead of putting the parties to a diffuse and unsatisfactory examination of witnesses on interrogatories. A Court of Equity *may*, by interlocutory order, either direct an issue, or give the party liberty to bring an action within a limited time, and reserve the consideration of all further directions till after the verdict. (g) And it is said that an *heir* and a *rector* or *vicar* have an *absolute right* to have such issue on a question of fact, though in other cases it is discretionary in the Court of Equity to direct such issue. (h) So numerous acts of parliament authorize an issue, sometimes termed a *feigned issue*, and the Courts of Law, in discussing motions on the validity of a warrant of attorney, frequently direct an issue to try a question of forgery, usury, &c. (i) Where a Court of Equity has sent an issue to be tried at law, there cannot be a motion in arrest of judgment, such a motion being incom-

(f) *Wheeler v. Duke and others*, 3 Tyr. R. 61; *Johnson v. Johnson*, id. 78; *Ward v. Swift*, id. 122.

(g) *Earl Pomfret v. Smith*, 4 Bro. P. C. 700; Chit. Eq. Dig. tit. Practice, p. 1068.

(h) 2 Madd. Chan. Pr. 474; and *post*

as to the jurisdiction of the Court of Chancery.

(i) *George v. Stanley*, 4 Taunt. 683. So in *Gurney v. Langland*, 5 B. & Ald. 330, the Court of King's Bench directed an issue to try whether the plaintiff had signed the warrant of attorney.

patible with the equitable nature and object of the issue and of such a Court, to ascertain a fact without regard to technical objections to pleading. (k) And for the same reason, in general the application for a new trial of such an issue must be made to the Court of Equity; (l) unless the judge who tried the cause has given leave to move, or when an *action* has been brought in pursuance of the order of a Court of Equity, in which case the motion for a new trial may be to the Court of Law. (l)

In aid of the jurisdiction of inferior Courts, when the defendant has removed himself or *his effects* out of the jurisdiction of an inferior Court, and the debt is under £20, this Court, and indeed also the Courts of Common Pleas and Exchequer, may, under the 19 G. 3, c. 70, s. 4, and 7 & 8 G. 4, c. 71, s. 6, remove the record of the proceedings from the inferior Court, and issue execution against the defendant's person or effects in any county of England. (m) But these acts do not extend to an action of *ejectment*, and are confined to *personal* actions. (n) There are however similar enactments in some of the Courts of Request, as the Bath Act and others. (o)

In aid of inferior Courts in enforcing their civil jurisdiction by *certiorari*, &c.

As an essential mode of exercising a controul over all inferior Courts, this Court has a most extensive power to bring before it their proceedings, and fully to inform itself upon every subject essential to decide upon the propriety of the proceedings

General utility of the writ of *certiorari* returnable in K. B.

(k) *Moseley v. Davies*, 11 Price, 162.

(l) 6 Taunt. 444; 6 D. & R. 71; 2 Chit. R. 270; Tidd, 913.

(m) Tidd, 9th ed. 401; 19 G. 3, c. 70, s. 4; 7 & 8 G. 4, c. 71, s. 6. By the 19 G. 3, c. 70, s. 4, reciting, that forasmuch as persons served with process issuing out of inferior Courts where the debt is under ten pounds,* may, in order to avoid execution, remove their persons and effects beyond the limits of the jurisdiction of such Courts, enacts, that in all cases where final judgment shall be obtained in any action or suit in any inferior Court of Record, it shall and may be lawful to and for any of his Majesty's Courts of Record at Westminster, upon affidavit made and filed therein of such judgment being obtained, and of diligent search and inquiry having been made after the person or persons of the defendant or defendants, or his, her or their effects, and of execution having issued against the person or persons or effects, as the case may be, of the defendant or defendants, and that the person or persons or effects of the defendant or defendants are not to be found within the jurisdiction of such inferior Court, which affidavit may be made before a judge or commissioner authorized to take affidavits; and such superior Court to cause the record of the said judgment to be removed into such superior Court, to issue writs of execution thereupon to the sheriff of any county, city, liberty or place, against the person or persons or effects of the said defendant or defendants, in the same manner as upon judgments obtained in the said Courts at Westminster; and the sheriff upon every such execution shall and he is hereby authorized to detain the defendant or defendants until the sum of twenty shillings be paid to him, or to levy the same out of the effects, according to the nature of the execution, for the extraordinary costs of the plaintiff or plaintiffs in the inferior Court subsequent to the said judgment, and of the execution in the superior Court, over and above the money for which such execution shall be issued.

(n) *Dee d. Stansfield v. Shipley*, M. T. 45 G. 3, c. lxxvii. s. 27; and the other acts, K. B. A.D. 1833, *Legal Observer*, 139. Tidd, 402.

(o) See the clause in the Bath Act,

* Extended to £20 by 7 & 8 G. 4, c. 71, s. 6.

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below. This is effected by a writ called *certiorari*, though its mandate is *to send* to the Court above the original proceedings, with all things touching the same. The writ issues in civil as well as criminal cases. Thus, such a writ was ordered to be issued to the judge of an inferior jurisdiction, to return and certify the *practice* of his Court; (*p*) and it lies to remove the proceedings in an action of ejectment from an inferior Court into K. B., and an *habeas corpus cum causa* is not requisite; (*q*) and this is the mode by which a defendant may, in such an action, remove the proceedings on an affidavit that he cannot have a fair and impartial trial in the Court below. (*r*) But as in criminal cases, so in civil, the Court will not remove the proceedings in an action after judgment below, especially when a judgment by default. (*s*)

Controul over by
Mandamus. (*t*)

We have also seen that this Court has a most extensive, and indeed *exclusive*, (*t*) jurisdiction (excepting in a few cases,) on motion supported by affidavits for a rule to shew cause, or a rule peremptory why a writ of *mandamus* should not issue to compel all inferior Courts and officers, and sometimes even private persons, to perform certain acts in general of a *public* nature, or in connexion with a *public duty*, and then even in favour of a private individual and his private right; (*u*) and analogous in some respects to, but even more extensive than the power of a Court of Equity by bill and decree to enforce *specific performance* of some acts, principally contracts. (*x*) As to the examination of witnesses in India, the 13 G. 3, c. 63, s. 44, authorizes the plaintiff or defendant to issue the writ out of *either* of the Courts at Westminster. (*y*) But in general this exceedingly important jurisdiction is peculiar to the Court of K. B. The costs of this proceeding are regulated by 1 W. 4, c. 21. We have in the previous volume so fully stated the substance of this remedy, that any further observations here would be useless repetition. (*z*) We have seen that Courts of Equity have two modes of compelling parties to perform what they ought to perform, and to forbear doing that which they ought not to do, viz. by *bill* for *specific performance*, or by bill and *injunction*, *prohibiting* the doing or continuing a particular

Suggestion for
the extension of
the remedies by
mandamus and
prohibition.

(*p*) *Williams v. Bagot*, 4 D. & R. 315.

(*q*) 1 B. & C. 253; 2 D. & R. 407.

(*r*) 3 B. & C. 530; 5 D. & R. 445.

(*s*) *Walker v. Gann*, 7 D. & R. 769.

(*t*) *Ante*, vol. i. 789 to 810, as to mandamus; Selw. Ni. Pri. tit. Mandamus; Tidd's Supplement, A.D. 1833, 206 to 211; and 1 W. 4, c. 21.

(*u*) *Ante*, vol. i. 790.

(*x*) As to which, see *ante*, vol. i. 824 to 872.

(*y*) *Ante*, vol. i. 789, note (*e*); and the recent act just noticed for enforcing the examination of witnesses *any where*, obviously greatly extended that jurisdiction.

(*z*) *Ante*, vol. i. 789 to 810, and this volume, 190, 201, 218, 229.

act; and it is singular how ingenious those Courts have been, in so varying the forms of those two important remedies as to effect the equitable object in view. Thus we have seen an instance of an *injunction* not to *permit* parts of buildings erected contrary to an agreement *to remain*, which was in effect a mandamus in *Equity* to *pull down and remove*. (a) And there seems no reason why, by the just application at law of the writ of mandamus and the writ of prohibition, justice should not be more perfectly administered in Courts of Law than has hitherto been the practice.

This Court has also very extensive, although not entirely exclusive jurisdiction, by *prohibition* (somewhat analogous to an injunction from a Court of Equity,) to restrain all other Courts, from the highest to the lowest, and whether or not of record, from proceeding in a matter over which they have no jurisdiction; (c) or when, having jurisdiction, the Court has attempted to proceed by rules differing from those which ought to be observed, (d) or where, by the inferior Court's exercise of its proper jurisdiction, a legal right would be defeated; as when an attorney held a will as a lien, and the Prerogative Court had granted probate to another person, the Court of K. B. by prohibition restrained the Ecclesiastical Court from acting on such probate, by which it might not only receive but distribute the whole of the assets, and defeat the lien. (e) In some cases the Court of Common Pleas (f) or Exchequer, (g) or the Court of Chancery (h) (but the latter only in vacation,) (i) may issue a prohibition. (k) But the Court of King's Bench is considered as the proper Court to apply to in term time, especially in cases of a public or criminal matter. (l) Though if a *quare impedit* be brought in an improper Court, it may be advisable to apply to the Court of Common Pleas for a prohibition, because that Court has exclusive cognizance of actions of *quare impedit*; (m) and if the king's farmer be sued in the Ec-

By Prohibition. (b)

(a) *Ante*, vol. i. 862, notes (m) and (n); *Rankin v. Huskisson*, 1 Clark & Fin. 13; *Lane v. Newdigate*, 10 Ves. 192.

(b) See the former proceedings in prohibition, 1 Saund. 136 to 142; 2 Sellon Pr. 424 to 455; and the Modern Prac. Tidd, Supplement, 1833, 200 to 206; 1 W. 4, c. 21; 2 Dowl. Stat. 37, 38, 39, and notes; Harrison's Index, Inferior Courts, II. Prohibition.

(c) See in general Bac. Ab. tit. Prohibition; Com. Dig. tit. Prohibition; Harrison's Index, Inferior Courts, II. Prohibition; 2 Sellon Pr. 1 ed. 424 to 455; Tidd, Supplement, 1833, 200; and 1 W. 4,

c. 21, altering the practice, and *post*.

(d) *Gloucester v. Bradley*, Bul. N. P. 219.

(e) See *post*, 357, note (a).

(f) *Hutton's case*, Hob. 15.

(g) *Slea v. Seymore*, Palmer, 525.

(h) *Anon.* 1 P. Wms. 476.

(i) *Montgomery v. Blair*, 2 Sch. & Lefr. 136; 9 Ves. 257; Willes' Rep. 426.

(k) Bac. Ab. Prohibition, A; Bro. Ab. tit. Prohibition, pl. 6; Inst. 81; Willes, 43.

(l) *Company of Horners*, 2 Rol. R. 471.

(m) *Moore*, 861; Bac. Ab. Prohibition, A.

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clesiastical Court for tithes, then it may be advisable to apply to the Exchequer for a prohibition on affidavit of a prescription for a modus, because that Court has peculiar cognizance of tithe suits and matters. (n) The writ of prohibition perhaps may be issued even to the Chancellor sitting in bankruptcy, if he should inadvertently assume a jurisdiction which he has not ; (o) at least there appears to be no exception as regards the dignity of the Court or person, and it may be issued to every description of Court, of whatever nature and however high or inferior; as to the county palatine, to the Ecclesiastical Court, in a tithe or other suit there, (p) to the Admiralty Court, Prize Court, County Court, (q) or to the sheriff, to prevent him from proceeding in a replevin suit where the replevy had been granted by a bailiff improperly appointed, (r) and to a Court of Requests, as where that Court, without authority, enjoined a creditor to give time to his debtor to pay his debt, upon security given, (s) or even to the Insolvent Court, (t) or to a justice of the peace to *prohibit* the proceeding to execution upon an unjust conviction, upon any information where he had refused to hear the merits, at any time whilst the conviction remained below and had not been removed by certiorari into this Court. (u) And perhaps in all cases (and especially so in cases where the removal of a conviction is expressly prohibited by statute) when a justice of the peace has manifestly convicted against the merits of the case, an immediate motion to the Court upon full affidavits for a writ of prohibition or for a rule nisi, may be an expedient proceeding, first giving six days' notice of motion in the alternative for that writ, or for a certiorari. The writ is also sustainable not only when a Court has *no* jurisdiction over the matter, but also when it is *proceeding irregularly* or improperly, as by requiring two witnesses to prove a fact, when by law only one witness was necessary. (x)

The writ is directed to the judge and the plaintiff in the suit

(n) Palm. 525 ; Bac. Ab. Prohibition, A.

(o) *Ex parte Cowan*, 3 B. & Ald. 123, cited *Ex parte Battine*, 4 B. & Adol. 693. This seems to be a disputed point, see 3 Bulst. 120 ; Bac. Ab. Prohibition, I. 7th edit. ; Ld. Raym. 531.

(p) And see 2 & 3 Ed. 6, c. 13 & 14 ; Tidd, 948.

(q) *The King v. Clarke*, 1 B. & Adol. 672 ; see cases 2 Sellon's Pr. 424, 425, 426 ; Bac. Ab. Prohibition, K. ; 3 Bla. Com. 113 ; Tidd's Prac. Supplement, 200.

Prohibition lies of trespass *vi et armis*, when brought in county Court, F. N. B. 47.

(r) *Griffiths v. Stevens*, 1 Chit. R. 196.

(s) Hulst. 20 ; Bac. Ab. Prohibition, I.

(t) *Ex parte Battine*, 4 B. & Adol. 693.

(u) Per Ld. Holt, C. J., in 2 Ld. Raym. 901 ; *Crephe v. Durdin*, Cowp. 646 ; 1 B. & Adol. 586, a. ; *ante*, this vol. 220, 221.

(x) 3 T. R. ; 2 Sellon's Pr. 425 ; 3 Bla. Com. 112.

in the inferior Court, commanding both to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising thereon, does not belong to that jurisdiction, but to the cognizance of some other Court. (y)

As regards Ecclesiastical Courts, Sir Simon Degge complained, that although prohibitions in themselves are excellent things when they are used upon just, legal and true grounds, yet as it sometimes turns out that they are applied for on untenable ground, and occasion great expense and delay, it would be well if the judges would think of some way to restrain them, or to make the applicants, when ultimately unsuccessful, pay well for their delay, by making the party applying enter into a recognizance to pay such costs as the Court, out of which the writ of prohibition issues, should award, in case the party should not succeed in his suggestion in convenient time, or some other course, to make them pay for the delay and increased expense by improperly objecting to the jurisdiction. (z) Where an attorney had a lien on a will, the Court of King's Bench even prohibited the Prerogative Court from proceeding on a probate until the lien had been satisfied. (a) The full extent of this jurisdiction, as well as the practical proceedings thereon, will be more properly considered in a subsequent chapter. (b) When a prohibition to an Ecclesiastical Court is to be applied for, as to prevent an improper suit therein relating to a pew, it is not necessary that the proceedings in the Ecclesiastical Court should be actually *at issue*, and it suffices if that Court be clearly *in progress* towards the trial of a question which ought properly only to be tried in a Court of Law. (c) The practice in prohibition has, by 1 W. 4, c. 21, s. 1 & 2, recently been greatly improved, by dispensing with the former necessity for filing a suggestion stating the proceedings below before the motion to this Court, and by enacting that the application may be made on affidavit only, (d) and the practice therein has otherwise been changed, and the party succeeding is now entitled to costs, (d) provided there have been *pleadings*

(y) 3 Bla. Com. 112.

(z) Degge, p. 2, c. 26; Burn. Ecc. L. Prohibition, p. 230, 231.

(a) Wood's case before Sir J. Nicholl, Prerogative Court, 3 July, 1834. But the Prerogative Court afterwards granted limited letters of administration to the widow to enable her to get in the effects, *post*, Prerogative Court. *Quære* as to any

lien on an original will, *ante*, vol. i. 513, note (n).

(b) See in general 2 Sellon's Prac. 424 to 455; Tidd, 498.

(c) *Byerley v. Windus*, 4 Law Journal, K. B. 102.

(d) Tidd, 948, and stat. 1 W. 4, c. 21, and notes; Dowl. Stat. vol. ii. 37, 38, 39; Tidd's Supplement, 1833, pp. 200 to 206. In Chaucery, as well as in the Courts of

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in prohibition, but not so where a rule is made absolute for a prohibition before plea. (e) It has been supposed that the damages to be recovered in prohibition should, as heretofore, still be merely nominal, (f) but the statute supposes actual damages to be recoverable, and there are instances where considerable damages have been recovered. (g)

But although the Court of King's Bench has in proper cases power to prohibit naval and military Courts Martial, (h) yet that Court refused to prohibit the carrying into effect the sentence of a Court Martial, even on the ground that the facts alleged against the party were not sufficient to bring his offence within the articles of war, and for which the Court Martial had sentenced him to be dismissed the service, and which sentence had been ratified and allowed by the king; for a Court Martial stands on grounds peculiar to itself, and as the king had ratified the sentence, and he might dismiss, even without the intervention of a Court Martial, the interference of the Court of King's Bench would be futile and useless. (i)

Prohibition to
prevent injury.

In some respects also the Court of King's Bench has jurisdiction by writ of *prohibition*, not only to prevent another Court from proceeding where it has no jurisdiction, but also to prevent the committing of a *public irremediable* injury, and analogous to the jurisdiction in equity of granting an *injunction*; but the Court seems reluctant to exercise this summary excellent jurisdiction unless in a very clear and urgent case, and will in general leave the applicant to proceed by *indictment* for the injury when completed, or to apply to a Court of Equity for an *injunction*; that Court in general interfering to prevent by *injunction* the completion of *waste* and *nuisances*, public and private, but not other crimes or injuries. (k) Where justices of the peace for the county of Dorset having under 43 G. 3, c. 59, contracted for the building of a new bridge in a different site, in lieu of the old one which was ruinous, and having directed the old bridge to be taken down *before the new one was pass-*

Law, the motion for a prohibition is to be grounded on an affidavit, (*Worcester v. Bennett*, Dick. 143, 336; 7 Ves. 254,) and the form of such affidavit in equity has been suggested, (7 Ves. 254,) and it is said that the defendant in the inferior Court must plead before he applies for a prohibition. (*Walker v. Fandehede*, Dick. 336; Dowl. Pr. R.)

(e) *R. v. Keeling*, 1 Dowl. Pr. Rep. 440; Tidd's Supplement, 1833, p. 205, and *Pewtress v. Harvey*, 1 B. & Adol. 154.

(f) Bull. N. P. 219; Tidd's Supple-

ment, 1833, p. 204.

(g) Dowlings's Statutes, 1 W. 4, c. 21, page 38, note (a); but see the statute and *Anger v. Brewer*, 1 Vent. 348, where 100l. damages were recovered; and see observations in *Pewtress v. Harvey*, 1 B. & Adol. 158.

(h) *Grant v. Gould*, 2 H. Bla. 100.

(i) *Ex parte Poe*, King's Bench, 14 Nov. 1833; and see *Grant v. Gould*, 2 H. Bla. 69, 100.

(k) *Ante*, vol. i. 696, 721 to 729; not other crimes, *id.* 697.

able, in order that the contractor might use the materials of the old bridge, the Court of King's Bench refused a writ of prohibition to them, to restrain them from pulling down the old bridge before the new one was passable, though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood in being obliged to use a roundabout way in the interval, and the Court referred the complainants to the ordinary remedy by indictment, if the pulling down the old bridge under those circumstances should constitute a nuisance, and the Court seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. (*l*) But as the motion for a prohibition was merely refused under the particular circumstances, that decision clearly establishes the general jurisdiction of the Court to prevent at least all public injuries when they think fit. And certainly the exercise of this high preventive jurisdiction cannot be too much extended, since laws for prevention are better than laws for punishment, (*m*) especially when the wrongful act about to be done will occasion public or extensive injury, which cannot be compensated, and perhaps very inadequately punished by indictment. Assuredly as a *single* judge in a Court of Equity is by law entrusted with jurisdiction to issue an injunction, there is no reason why the four judges of a Court of Law should not exercise a jurisdiction which is most salutary, and is unquestionably vested in them. But nevertheless *in practice* there is no remedy in Courts of *Law* to prevent any injury, (except personal violence, by articles or sureties of the peace,) and no Court at present interferes to *anticipate and prevent* other continuous or repeated injuries, as libels, attempts to seduce a daughter, and numerous other injuries, which can only be *punished* after they have been committed, by a person perhaps wholly unable to pay any damages he has maliciously occasioned. (*n*) It was held in the Court of Common Pleas, that that Court has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the suit of an uninterested person; and it was supposed that no Court of Common Law has that power, such waste being in the nature of a mere private injury; and it was even

(*l*) *R. v. Dorset*, 15 East, 594. And see other cases, *ante*, vol. i. 803, tit. *Public Works*.

(*m*) *Wilcock v. Windon*, 3 B. & Adol. 43; and *Venegas v. Attwood*, 1 Mod. 202, *ante*, vol. i. 19.

(*n*) It is submitted that there is a de-

fect in the practice of the law. It would be well if Courts of *Law* in practice interfered, on affidavit and motion, to prevent every description of crime and injury which it could be demonstrated a party was about to commit.

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As a Court of Appeal in civil cases, as *formally* by writ of error or false judgment, or *summarily*.

doubted whether the Court of Chancery had any jurisdiction. (o) It seems to be a disputed point whether a prohibition lies so as to decide upon a controversy whether a will ought to be proved before a peculiar or before the ordinary, or what ecclesiastical judge shall grant probate. (p)

Before the 1 W. 4, c. 70, s. 18, a writ of error from the judgment of the Court of Common Pleas, upon matter of law, was returnable in King's Bench, (q) and this even in a real action, over which the latter Court had no original jurisdiction; but that act, we have seen, now requires all writs of error from the Court of Common Pleas to be returnable direct into the Exchequer Chamber. (r) But still from *all inferior Courts of Record* (excepting in London and a few other places) the writ of error is returnable in King's Bench and not in Common Pleas; (s) but no writ of error nor certiorari lies from the Mayor's Court or other Court in London, (t) from which there is a peculiar Court of Error. (u.) Writs of *error in fact*, as infancy (x) and coverture, lie from a judgment of the Court of Common Pleas, returnable in that Court or in King's Bench; for the statute 1 W. 4, c. 70, s. 8, does not extend to errors in fact; and for an error in *fact* in a judgment of this Court the writ of error is returnable here in the same Court. (x)

A writ of *false judgment* from the formal judgment of an inferior Court, not of record, but proceeding *according to the course of the common law*, and which writ is issued out of Chancery, is properly returnable into this Court or in the Common Pleas. (y) But no such writ lies from a Court of Requests or other Court, which by statute is directed to give judgment according to equity and good conscience, and not according to the usual course of proceeding at common law, because a Court so constituted is not bound by the rules of pleading or evidence as in formal suits at law; and therefore where such writ was brought from the Southwark Court of Requests to the Court of Common Pleas, the latter directed it to be sent back by writ

(o) *Jefferson v. Durham*, 1 Bos. & Pul. 105. But see 3 Swanst. 493, 499. See *ante*, vol. i. 722 to 731, as to injunctions in equity to restrain waste.

(p) *Vec. Ab. Prohibition*, I.; *Mod.* 211, *acc.*; 10 *Mod.* 272.

(q) *Tidd*, 1137.

(r) *Ante*, 308, 309.

(s) *Tidd*, 1137, 1138; *Ballard v. Bennett*, 2 Burr. 777; *Finch*, L. 480; *Ap Richards v. Jones*, *Dyer*, 250; *Roe v. Harth*, *Cro. Eliz.* 26; 3 *Bla. Com.* 410.

(t) *Ibid.*; *Clarke v. Le Cren*, 9 Bar. & Cress. 57; *Watson v. Clarke*, *Carth.* 75; *Ballard v. Bennett*, 2 Burr. 777.

(u) 6 Bro. P. C. 181; *Ballard v. Bennett*, 2 Burr. 777; *Cole v. Green*, 1 Lev. 309; 2 *Saund.* 253, S. C.

(x) *Castledine v. Mundy*, 4 B. & Adol. 90.

(y) See *Fitz. N.B.* 18; *Tidd's Forms*, 559; *Tidd*, vol. i. 38, and *fully* vol. ii. 1134, 1187, 1188.

of procedendo. (2) In general the decisions of Courts of Requests are final, unless in some of the acts, as now in the Southwark act, the proceedings in which are *now* removable by certiorari, and if erroneous may be set aside by the Court of King's Bench. (a)

The Courts of King's Bench and Common Pleas (not the Exchequer, but for what reason does not appear,) are constituted Courts of Summary Appeal from the decision of justices of the peace, when they have, under the 11 G. 2, c. 19, s. 16, given possession of tenanted premises, upon the supposition of the tenant having deserted them when the rent has been in arrear; and the 17th section of that act enables the tenant to appeal to the judges on the circuit, or the Court of King's Bench or Common Pleas (but singularly, *omitting the Exchequer*,) when the premises are in London or Middlesex, and which judges may order restitution or may affirm the act of the justices. (b) It has been decided that a landlord may proceed under the 16th section of the act, although he knew where the tenant was to be found, and although the justices found a servant of the tenant on the premises when they first went to view the same; and the justices' record need not state the landlord's reserved right of re-entry, although such right must have in fact existed. (c) The Courts, under this power of appeal, are not bound by any strict rule, and may order restitution on such equitable terms as they shall think fit, although the landlord's legal right of re-entry was clear and the proceedings perfectly regular. (d) Upon the other hand, although the decision of the justices may be reversed, yet their own record protects them and all acting under them from liability to any action. (e)

Landlord and
Tenant. Ap-
peal from
justice's deci-
sion.

The Court of King's Bench, or its judges, are in may in-

As a Court of
Appeal in other
cases.

(2) *Scott v. Bye*, 9 Moore, 649; 2 Bing. 163, S. C. Bing. 344, S. C.; *Bates v. Turner*, 10 (a) 4 G. 4, c. 123, s. 15, 16; *Carden Moore*, 32; *Tingle v. Roston*, *id.* 171; 2 v. *Burford*, 2 Man. & Ryl. 170.

(b) 11 G. 2, c. 19, s. 17. Provided always, that such proceedings of the said justices shall be examinable in a summary way by the next Justice or Justices of Assize of the respective counties in which such lands or premises lie; and if they lie in the city of London or county of Middlesex by the Judges of the Courts of King's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; and if in Wales, then before the Courts of Grand Sessions respectively; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, and to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding five pounds for the frivolous appeal. See the statute Chitty's Col. Stat. tit. Landlord and Tenant, 673, 674, and notes.

(c) *Ex-parte Pilton*, 1 B. & Ald. 369. 649; 5 Dowl. & R. 558, S. C. And as to proceedings, see *Lister v. Brown*, 3 Dowl. & R. 501; 1 Car. & P. 121, S. C.; *Basten v. Carew*, 3 Bar. & C. (d) MS. K. B. (e) *Ashcroft v. Bourne*, 3 B. & Adol. 684.

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stances constituted by statute, in effect though not in form, a *Court of Appeal* from inferior commissioners or persons, as under the assessed-tax acts, when the commissioners are directed, at the instance of appellant or assessor, to state a case for the opinion of one of the judges of King's Bench, Common Pleas, or Exchequer. (f) But as these cases are not discussed in open Court, the proceedings relative to them are not strictly parts of the practice of the Courts. Formerly, in one case the Court of Exchequer ordered the commissioners of taxes to sign a case for the appellants for the opinion of a judge, where a question arose respecting certain increase of duty made by the surveyor or the appellant. (g)

Anciently, when the judges had comparatively but little business to transact in full Court, or on the circuit, we find historically that many questions of law, and in some respects of fact, used to be referred to one or more of the judges, especially on the circuit; (h) also the propriety of corporation by-laws; (i) and all questions upon which justices at sessions had doubted and had required assistance and advice. (k) But in the present times, when the arduous higher duties of the judges have so greatly increased, they ought to be relieved from all these collateral functions, which exact the performance of burdensome duties foreign to their proper functions and much beyond any reasonable claim upon them as incidents of their office; and accordingly, the approval of the regulations of Savings' Banks and some others have of late been delegated to a barrister. (l)

Secondly, Jurisdiction of K. B. over cases of a criminal or public nature.

The King's Bench has also *original* jurisdiction, by *indictment* or *criminal information*, over most *crimes*, *misdemeanors*, and *offences* committed in Middlesex, or whilst the Court was ambulatory, committed in any county in which it happened to sit, and indeed these subjects were originally the *principal* objects of its jurisdiction. This Court, indeed, is the highest and most extensive of *criminal* justice within the realm as regards such offences, for there is no other Court of *general* criminal jurisdiction, or for controlling or appealing from any

(f) 43 G. 3. c. 99, s. 29, and c. 161, s. 73; 45 G. 3, c. 71, s. 3; 4 G. 4, c. 11, s. 7.

(g) In *re Yarmouth Commissioners*, 9 Price Rep. 149, *post*, Exchequer.

(h) See Burn's Justice, tit. Poor, 26 ed. vol. iv. 786, 787; *R. v. Natland*, Bur. Set. Cases, 793; *Curdren v. Leyland*,

2 Stra. 903; and Burn's Justice, tit. Sessions of the Peace, IV. (3); Dick. Sess. 627.

(i) 19 Hen. 7, c. 7; *Chamberlain of London's Case*, 5 Coke, 63 b.; Com. Dig. Bye Law, C.; Rol. Ab. 363.

(k) *Supra*, note (h).

(l) 9 G. 4, c. 92, s. 4; 5 W. 4, c. 40.

other inferior criminal jurisdiction; and as to offences committed in the county where it sits, this Court has a jurisdiction so paramount to all others, that, therefore, if it were not for the express enactment in 25 G. 3, c. 18; it would during each term supersede or suspend all other criminal jurisdiction in that county. (m) It has, at common law, jurisdiction by indictment By Indictment. over every description of criminal offence committed in Middlesex, from high treason and felony down to the smallest misdemeanor or breach of the peace. (n) Indictments for *Perjury* (which in general cannot be preferred at the general or quarter sessions, but only at the assizes, or in this Court, when the perjury was in Middlesex, (o)) and *Conspiracies* are now the most frequent in this Court, especially when for perjury in answers or affidavits. So by different statutes, some offences committed out of the realm may be prosecuted by indictment in Middlesex; (p) but in general, without some express enactment, offences committed out of England are not cognizable in this Court; (q) and when the offence has been committed out of the kingdom, it is now more usual to proceed by special commission—as for a murder by duelling in France, or elsewhere abroad, between two subjects, or a subject and a foreigner. (r) For the purpose of exercising this criminal jurisdiction by indictment in Middlesex, grand juries for Middlesex are, on two days in each of the four terms, summoned and sworn before the senior of the puisne judges, and who charges or addresses them respecting their duty in the Court of King's Bench, and which constitutes the first business in the morning, before the sitting of the full Court; and such jury afterwards find or ignore bills of indictment presented to them for crimes committed in the county, principally for conspiracies, perjury, and other misdemeanors, and afterwards come into full Court and present their findings, and which are then filed in the Crown Office; and after the issues have been joined, they are tried at nisi prius amongst the civil causes. (s)

So all *misdemeanors*, whether committed in Middlesex, or in any county in England, may, as regards jurisdiction, be prosecuted by *criminal information* filed by the Attorney-General ex By Criminal Information.

(m) Bac Ab. Court of King's Bench, B.

(n) *Lord Sanchar's case*, 9 Coke, 118 a, b; 2 Sellon, 618.

(o) Hawk. B. 2, c. 8, s. 64; 2 Stra. 1088; 2 Ld. Raym. 1144; 1 Salk. 407; and see *R. v. Haynes*, 1 Ry. & Mood. 298, that if originally an indictment for perjury were found at sessions, and removed into K. B. by certiorari, the Court

cannot try it.

(p) 42 G. 3, c. 85; *R. v. Jones*, 8 East, 31; 24 G. 3, s. 2, c. 25; *R. v. Holland*, 5 T. R. 607; *R. v. Platt*, 1 Leach, 157; 1 Hale, 1.

(q) 1 Sess. Cas. 266; *R. v. Munton*, 1 Esp. R. 62.

(r) *R. v. Helsham*, 7 Oct. 1830, 1 Burn. J. tit. Duelling.

(s) Hand's Prac. Intro. xx.

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officio, i. e. of his own authority, without the previous leave of the Court; or on the application of a subject to and by leave of the Court, an information for such misdemeanor may be filed in the Crown Office; and by various statutes, some offences committed out of the kingdom are cognizable in this Court. (t)

In no case of *treason* or *felony* can an *information* be sustained, but there must be a bill of *indictment* for such higher offences *found by a grand jury.* (u) The principal difference between the proceedings by indictment or by information is, that the former must be first presented to and found by a grand jury of the county in which the offence was committed, and afterwards tried by a petty jury; whereas, when the Attorney-General *ex-officio* files an information, or when upon affidavit and motion, and hearing of both parties on affidavit, the Court give leave to file an information, and it is accordingly filed, such permission of the judges indicating that upon the affidavits of the facts before them, there is in their opinion *reasonable ground* for the criminal information, is equivalent to and dispenses with the necessity for the finding of a bill of indictment by a grand jury; and the criminal process immediately issues against the offender, and who having appeared and pleaded to the information in the Crown Office, the issue thereon is sent down to be tried in the proper county by a petty jury, amongst the other records to be tried at *nisi prius*, or at the assizes on the civil side. When, therefore, a serious public misdemeanor has been committed, especially by a magistrate, or when a challenge has been sent, or a libel of an aggravated character has been published, requiring the immediate interposition of this Court, it is advisable, in order to prevent a further breach of the peace, to endeavour to obtain leave to proceed by criminal information, instead of waiting until the sessions or assizes, or incurring the risk of a grand jury ignoring the bill of indictment in consequence of local influence or favor.

With respect to misdemeanors in general, although unquestionably this Court has jurisdiction over every variety of that description of offences however inferior, yet great inconvenience having been felt from compelling persons in low circumstances to shew cause against informations in the King's Bench, and after conviction to travel to Westminster from perhaps a very remote part of the country, and consequently at a great expense

(t) 2 Hale, C. P. 3; *R. v. Munton*, 1 Esp. R. 62; 1 Sess. Cas. 246; 2 New R. 91; *R. v. Johnson*, 6 East's R. 589, 590.
(u) 2 Hale, 151; 1 Shower, 109, 110.

and loss of time, to receive judgment, the Court came to a resolution not to grant any informations against such persons, however fit the subject might be in other respects for such mode of prosecution, as justice could be effectually done otherwise either at the sessions or at the assizes, and the proceeding by way of indictment is evidently the more proper in such cases; (x) and it has been regretted that the same rule has not been adopted by the attorney-general on prosecutions by him under the revenue laws; (y) however, the necessity for the party coming up to receive judgment has been recently in a great measure removed by the provision we will presently notice. (z) This Court has also resolved not to grant informations against overseers, or other persons, for procuring the marriage of a pauper with intent to burthen another parish, though formerly informations for such an offence were frequent. (a) But subject to these, and a few other exceptions in practice, a very considerable portion of the time of this Court is occupied by *motions for leave to file criminal informations in the Crown Office* either against magistrates or other public officers, or for challenges, libels, and other misdemeanors; and where the parties concerned are of rank, and the offence committed demands immediate interposition, and when the party applying can by affidavits demonstrate that he gave no provocation, and was wholly free from blame, or in case of libel free from the least ground of suspicion of the offence imputed to him, it may be advisable to adopt this course in lieu of preferring a bill of indictment to a grand jury, or proceeding by action, and in all those cases when it is almost certain that the Court will make the rule absolute. But where the party challenged or libelled is of inferior rank, or is not wholly free from blame, or the accused magistrate has acted *bonâ fide*, the Court will usually leave the prosecutor to proceed by indictment at the sessions or assizes, or by action. The jurisdiction to grant leave to file a criminal information in the Crown Office is one of the highest, and perhaps most delicate and discreet branches of jurisdiction, somewhat in the nature of the ancient Court of Honour; and accordingly a criminal information is granted or refused, not according to any strict legal rule, but depending on the question whether the party applying has in all respects acted as a gentleman, and therefore deserves the protection of the Court, or whether the other party has acted malignantly and without provocation. And when the Court refuse the application, it

(x) *R. v. Compton*, Cald. 246.(y) *Bac. Ab. tit. Informations, D.*

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(z) 1 W. 4, c. 70, s. 9.

(a) *R. v. Compton*, Cald. 246, 247.

E E

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Alteration in
the practice;
and of giving
judgment im-
mediately after
trial in criminal
cases.

does not necessarily follow that the applicant must pay costs, for sometimes the application will be discharged on the terms of the other party paying the costs.

Formerly, as an incident of the criminal jurisdiction of the Court, whenever there was a trial in any county of England upon a record out of the King's Bench for felony or misdemeanor, judgment was delayed until the next term, and then the party convicted, however impoverished and however long he had remained in prison, must have travelled up to London in order to hear the judgment of the Court in full Court, by which great trouble and expense to the parties, and to the public in case of paupers, was incurred, and the *effect of immediate punishment* as an example was prevented, and much valuable time of the Courts was consumed; (b) but now by 1 W. 4, c. 70, s. 9, (c) the judge who presides on the trial may pronounce judgment immediately after the sittings or assizes on the party convicted, whether by default, or confession or verdict, and whether such person be present in Court or not, except in cases of criminal information filed by *leave of the Court* or information filed by *the attorney-general*, and wherein he shall pray that the judgment may be postponed, but the Court above may still on motion grant a new trial. (d) This enactment, by enabling the judge to pronounce judgment immediately after the trial, gives more salutary effect by way of example, and prevents much expense and delay and consumption of time in Court, and long imprisonment whilst waiting

(b) The 5 W. & M. c. 11, recites, that defendants used to remove indictments by certiorari, "fearing to be deservedly punished where they and their offences are well known," thereby importing that the legislature then thought that probably the

trial and judgment were usually most efficacious when in the neighbourhood of the place where the offence was committed, than at a distance in the Court of King's Bench.

(c) 1 W. 4, c. 70, s. 9, enacts, That "upon all trials for felonies or misdemeanors upon any record of the Court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in Court, excepting only where the prosecution shall be by *information filed by leave of the Court* of King's Bench, or such cases of informations filed by his Majesty's Attorney General, wherein the Attorney General shall pray that the judgment may be postponed, and the judgment so pronounced shall be indorsed upon the record of Nisi Prius, and afterwards entered upon the record in Court, and shall be of the same force and effect as a judgment of the Court, unless the Court shall within six days after the commencement of the ensuing term grant a rule to shew cause why a new trial should not be had or the judgment amended, and it shall be lawful for the judge, before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term, and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison.

(d) See Chit. Pr. 185, 186; R. v. Cor, 4 Car. & P. 538; R. v. Woodward, id. 540.

until the next term; and the only danger may be that possibly some judge might, under the excitement occasioned by the profligacy of the offender, in some case pronounce a more severe punishment than perhaps the full Court might, at a subsequent period, have inflicted.

It is only in this superior Court, or by application to the Chancellor, that *articles of the peace* can be exhibited so as to obtain security against threatened personal injury, when the party against whom the application is to be made is a peer, for the Courts of Common Pleas and Exchequer have no jurisdiction in those cases. (e) In ordinary cases application must be first made to a local magistrate or court of session for sureties to keep the peace; but if the party required to find sureties be a peer, or the local magistrates have refused to interfere, or if the parties be of rank, or be a married woman and require immediate protection against her husband, this Court may with propriety be applied to. (f)

Articles of the peace.

Another very important and extensive jurisdiction peculiar to this Court, *nominally*, in some respects, as being on the same side of the Court, *criminal*, but considered as *substantially civil*, relates to *franchises* and *liberties*, and to *corporations* and *offices* of a *public nature*, where any subject or body politic has usurped or assumed to act on any franchise or privilege not being legally entitled, and which is supposed to be either injurious to another party really entitled to the franchise, or to the public, and which proceeding calls on the defendant to shew by what authority (*quo warranto*) he has assumed to act in some named *public office*, &c. An information in the nature of a *quo warranto* cannot be filed against an *entire corporation* by the master of the Crown Office, but can only be filed by the attorney-general, (h) though when only a *particular individual* illegally usurps an office or franchise in an acknowledged corporation it is otherwise. (h) So there is no instance of a *quo warranto* information having been granted by leave of

Quo Warranto, (g)

(e) Hawk. b. i. c. 60, s. 3; *ante*, vol. i. 679.

(f) See the cases and practice, *ante*, vol. i. 679 to 684.

(g) See in general, Bac. Ab. Information, D. id. Appendix, same title; Selwyn Ni. Pri. Quo Warranto; Harrison's Index, Quo Warranto; 9 Ann. c. 20, s. 4; 32 G. 3, c. 58; 48 G. 3, c. 58; Tidd, 595,

949.

N.B. It would be impossible here to notice the whole law of corporate and other rights, or the whole proceeding on *quo warranto*. Many cases will be found in the Law Journal not elsewhere reported. See *Exchequer*, *post*, 395.

(h) *R. v. Ogden*, 10 B. & C. 230; 9 Ann. c. 20.

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the Court against persons for usurping a franchise of a mere *private* nature not connected with *public* government, (*i*) in which respect the interference of this Court in cases of *quo warranto* is influenced by the same principle as in the instance of granting a *mandamus*. (*k*) In these cases the Court (having a *discretionary* jurisdiction, (*l*) but which is influenced by decisions and long practice) may, upon proper affidavits, grant a *rule* to shew cause why an information *in the nature* of a *quo warranto*, directed to the party supposed to have been guilty of the usurpation, should not issue; and which rule is afterwards discharged or made absolute according to circumstances; or the Court receives an information, filed *ex officio* by the proper officer of the crown, upon facts disclosed in the affidavits of private persons shewing sufficient ground for the interposition of this Court; and if the usurpation upon the trial be found unlawful, then the party proceeded against will be ousted, and the franchise, if capable of seizure, seized into the king's hands. (*m*) Informations in the nature of *quo warranto* are now considered as *civil* proceedings, *i. e.* to try a civil right, usually a corporate franchise, though of a public nature, (*n*) but still the proceedings are in the *Crown Office*, and consequently are here noticed.

It is no objection to the granting of an information in the nature of a *quo warranto*, that the person applying is in low and indigent circumstances, and that there is strong ground of suspicion that he is applying, not on his own account or at his own expense, but in collusion with a stranger; the Court, however, in a case of this kind required security for the costs. (*o*) Nor is it any objection that it is a friendly proceeding in order that the party might disclaim. (*p*) The jurisdiction, practice and costs in *quo warranto* will hereafter be fully considered.

A most important jurisdiction is exercised exclusively by this Court, in the removal of proceedings on indictments and presentments of justices or constables, or on coroner's inquests, into this Court, in order that the form and merits may be there discussed, prosecuted and tried. This is a common law jurisdiction, modified by statutes. A *certiorari* is a writ issuing out of this Court, under the chief justice's name, directed in the king's name to the judge or officer of an inferior Court, commanding them to certify or (in the more modern form) *send* the record or proceeding before them to the Court of King's Bench, in

Removal of
indictments and
presentments
from inferior
Courts.

(i) Per Bayley, J. in *R. v. Ogden*, 10 B. & C. 233.

(k) *Ante*, vol. i. 789, 790, 798, 799.

(l) *R. v. Trevencum*, 2 B. & Ald. 479; *R. v. Dawes*, 4 Burr. 2022.

(m) 2 Sellon, 619; Tidd, 949.

(n) Tidd, 595.

(o) *R. v. Wakelin*, 1 B. & Adol. 50;

and see *R. v. Benney*, *id.* 634.

(p) *R. v. Marshall*, 2 Chit. R. 370.

order that the Court " may further cause to be done therein what of right and according to law that Court should see fit to be done." And its use is, that the superior Court may consider and determine the validity of indictments, presentments, convictions, orders, &c. and the proceedings relating to the same, and to quash or confirm, or proceed to trial of the former, or to issue process of outlawry against the offender in those cases where the inferior Court could not reach him, (q) to have a trial by a special jury after a view and the assistance of a king's counsel. It would be foreign to our purpose to treat fully of this proceeding, and our observations will be merely for the purpose of shewing the practice in this Court, and principally on behalf of a defendant. This Court, we have seen, has only an *original* jurisdiction over criminal matters occurring in Middlesex, or where the Court when ambulatory happened to sit; but by *certiorari* any indictment, presentment, &c. found or presented in any part of England, may be removed into the King's Bench, after which the proceedings thereon are to be according to the course and practice of that Court.

Here it is to be observed as a *general rule*, that if the indictment or other proceedings was originally insufficient or was found by an improper Court or jury, the circumstance of its removal by *certiorari* into the King's Bench, and subsequent proceedings thereon, these will not get rid of the objections; and, therefore, where an indictment for *perjury* at common law was found at the *quarter sessions* and removed into this Court, and thence sent down to trial at the assizes, Mr. Justice Gaselee said, " that it was quite clear that the sessions had no jurisdiction over perjury at common law, and as the indictment was therefore void as found by an incompetent tribunal, he refused to try it." (r) Still, however, if a defendant has thus been prosecuted before an improper tribunal, it will be safer to remove the proceeding, and then apply to the Court of King's Bench to quash the same.

As respects the removal of *indictments* and presentments there are at common law and by statutes material distinctions as regards the *time* and *mode* of removal, for before verdict the removal is by *certiorari*, whereas after judgment below it is by writ of error. It is a general maxim, applicable to indictments as well as convictions, that at common law, before judgment, they are removable by *certiorari*, unless some very express enact-

(q) 4 Bla. Com. 321; Com. Dig. *Certiorari*; Bac. Ab. *Certiorari*; Hawk. b. ii. c. 27.

(r) *R. v. Haynes*, 1 Ryan & Moo. R. 298.

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ment has taken away the right to remove, (s) and even then if one count be introduced not affected by such express enactment the whole indictment is removable. (t) Formerly the removal of indictments by certiorari before judgment was of course, but such general liberty having, as the 5 W. & M. c. 11, (u) recites, been abused by persons "*fearing to be de-*

(s) And see in particular *R. v. Moreley*, 2 Burr. 1040; *R. v. Middlesex*, 8 Dowland & R. 117. (t) MS. *R. v. Saunders*, and 5 D. & R. 611.

(u) 5 W. & M. c. 11. "An Act to prevent Delays of Proceedings at the Quarter Sessions of the Peace," recites, "whereas it is experienced that notwithstanding the prior statutes made in the 21 James 1, c. 13 and 14, and 20 Car. 2, concerning the granting of writs of certiorari to remove indictments of riots, forcible entry, assault and battery, and other presentments and indictments, out of the Courts of the General or Quarter Sessions of the Peace in the counties or places wherein such indictments have been found, and proceedings thereupon recorded, into their majesty's Court of King's Bench, divers turbulent contentions, lewd and evil disposed persons, *fearing to be deservedly punished where they and their offences are well known*, have not only obtained writs of certiorari for removing such indictments found against them as aforesaid, but also indictments for sundry other trespasses, frauds, nuisances, contempts and misdemeanors after issue joined, and the prosecutors attending with their counsel and witnesses to try the same before the said justices of the peace in their said sessions, to the great discouragement of the prosecutors and of such constables and other officers as, according to their duty, present persons for those and such like trespasses, offences, and misdemeanors, for remedy whereof and that such offenders may be brought to condign punishment,

No certiorari to be granted but upon motion of counsel, and upon a rule granted in open Court;

and that before allowance of certiorari a recognizance by two sureties shall be acknowledged before justices.

Conditioned return of certiorari to appear and plead to the indictment or presentment, and at costs of prosecutor of certiorari, to cause the issue joined to be tried at next assizes;

such recognizance to be certified and returned with certiorari and indictment to King's Bench; otherwise the Court below

II. Be it enacted, That in term time no writ of certiorari whatever, at the prosecution of any party indicted, be hereafter granted, awarded or directed out of the said Court of King's Bench, to remove any such indictment or presentment of trespass or misdemeanor, *before trial had*, from before the said justices in the said Courts of General or Quarter Sessions of the Peace, unless such certiorari shall be granted or awarded upon motion of counsel and by rule of Court made for the granting thereof, before the judge or judges of the said Court of King's Bench sitting in open Court. And that all the parties indicted, prosecuting such certiorari, before the allowance thereof, shall find two sufficient mancaptors, who shall enter into a recognizance before one or more justices of the peace of the county or place in the sum of twenty pounds, with condition at the return of such writ to appear and plead to the said indictment or presentment in the said Court of King's Bench, and at his and their own costs and charges to cause and procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereunto, to be tried at the next assizes to be held for the county wherein the said indictment or presentment was found after such certiorari shall be returnable, if not in the cities of London, Westminster, or county of Middlesex, and if in the said cities or county, then to cause or procure it to be tried the next term after wherein such certiorari shall be granted, or at the sitting after the said term, if the Court of King's Bench shall not appoint any other time for the trial thereof, and if any other time shall be appointed by the Court, then at such other time, and to give due notice of such trial to the prosecutor or his clerk in Court; and that the said recognizance and recognizances, taken as aforesaid, shall be certified into the said Court of King's Bench, with the said certiorari and indictment, to be there filed, and the name of the prosecutor (if he be the party grieved or injured,) or some public officer, to be indorsed on the back of the said indictment; and if the person prosecuting such certiorari, being the defendant, shall not, before allowance thereof, procure such mancaptors to be bound in a recognizance as aforesaid, the justices of the peace may and shall proceed to trial of the said indictment at the said sessions, notwithstanding such writ of certiorari so delivered.

III. That if the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tythingman, churchwarden or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them, as officer or officers, to prosecute or present which costs shall be taxed according to the course of the said Court, and that the prosecutor, for the recovery of such costs, shall, within ten days after demand made of the defendant and refusal of payment, on oath, have an attachment granted

servedly punished where they and their offences are well known," viz. at the sessions or quarter sessions near the place of the offence, that act enacts that in term time no writ of certiorari at the instance of the party prosecuted shall be granted out of King's Bench, to remove any indictment or presentment of *trespass or misdemeanor*, before a trial had, from before the justices of sessions, unless such certiorari shall be granted upon *motion* of counsel, and by *rule* of court made for granting thereof; and that before allowance of the certiorari by the Court below, there shall be a recognizance with two sureties, acknowledged before one justice, in £20, conditioned for the defendant's, at return of the certiorari, appearing and pleading in King's Bench to the indictment or presentment, and causing the issue joined to be tried at the next assizes, and that such

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against the defendant by the said Court for such his contempt, and that the said recognizance shall not be discharged till the costs so taxed shall be paid.

IV. Enacts, That in any of the vacations, writs of certiorari may be granted by any of the justices of their majesty's Court of King's Bench, whose names shall be indorsed on the said writ, and also the name of such person at whose instance the same is granted; and that the party or parties indicted prosecuting such certiorari, shall, before the allowance of such writ or writs of certiorari, find such sureties in such sum, and with such conditions as are before mentioned and specified in this present act.

V. Enacts, That upon every certiorari granted or awarded within the counties palatine of Chester, Lancaster or Durham, to remove indictments or presentments for any of the matters aforementioned, all the parties indicted prosecuting such certiorari shall find such sureties to be bound in such sums, and with such respective conditions, and at his or their own costs and charges, shall cause and procure the issue joined upon the said indictments or presentments to be tried at the next assizes or general gaol delivery, to be held for the said respective counties, and shall give like notice to the prosecutor, and if convicted shall be liable to like costs, to be taxed, as is by this act provided for in cases where the same are granted or awarded out of the Court of King's Bench at Westminster.

VI. Provides and enacts, That if any indictment or presentment be against any person or persons for not repairing of any *highways*, causeways, pavements or bridges, and the *right or title to repair the same may come in question, upon such suggestion and affidavit made of the truth thereof*, a certiorari may be granted to remove the same into the Court of King's Bench, any law or statute to the contrary in any wise notwithstanding. Provided nevertheless, that the party or parties prosecuting such certiorari, shall find two manucaptors to be bound in a recognizance with conditions as aforesaid. [Rendered perpetual by 8 & 9 W. 3, c. 33.]

The 8 & 9 W. 3, c. 33, s. 1, renders perpetual 5 W. & M. c. 11, sect. 2. and for the making the purpose and design of the said act more effectual, enacts, that the party or parties prosecuting any certiorari to remove any indictment or presentment from the quarter or general sessions of the peace, may find two sufficient manucaptors, who shall enter into a recognizance before any one of his majesty's justices of the Court of King's Bench, in the same sum and under the same condition as is required by the said act, whereof mention shall be made on the back of such writ, under the hand of the justice taking the same, which shall be as effectual and available to all intents and purposes to stay or supersede any further proceedings upon any indictment or presentment, for the removal of which the said writ of certiorari shall be granted, as if the recognizance had been taken before any one of the justices of the peace of the county or place where such indictment was found or presentment made, and also it shall be added to the condition of every recognizance taken by virtue of this and the said act, that the party or parties prosecuting such writ of certiorari shall appear from day to day in the said Court of King's Bench, and not depart until he or they shall be discharged by the said Court.

certiorari may be before a judge of King's Bench in same sum as required by 5 W. & M. c. 11; but in addition to the terms of the recognizance, the condition is to be for the party defending appearing in King's Bench from day to day in Court.

may proceed to try the indictment.

In case defendant be convicted, King's Bench to give costs to prosecutor, if the party grieved, or public officer, &c.

And attachment issue for such costs.

In vacation a judge of King's Bench may grant a certiorari and the like recognizance required.

Certiorari in counties palatine of Chester, Lancaster or Durham.

Certiorari to remove indictment or presentment for not repairing highways, bridges, &c., in case the obligation to repair should come in question.

That the recognizance for cer-

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recognizance shall be certified and returned with the certiorari and indictment into the King's Bench; and that if such recognizance be not acknowledged the Court below shall proceed to try the indictment. The 3d section enacts that if the defendant be convicted the Court of King's Bench may give reasonable costs to the prosecutor if he be a party aggrieved, or a justice or officer prosecuting in respect of his office, and that an attachment shall issue in case such costs be not paid. The 5th section authorizes a judge to issue a certiorari in vacation, but the like recognizance is to be acknowledged before it be allowed. The 6th section authorizes the removal of indictments and presentments for not repairing a highway or bridge, upon affidavit that the right or title to repair the same may come in question. The 9 & 10 W. 3, c. 33, s. 1, renders perpetual this act, and enacts that the recognizance may be acknowledged before a judge of King's Bench, but with the additional stipulation that the defendant shall appear from day to day in the Court of King's Bench, and not depart until discharged by that Court.

As these acts require in term time a motion and rule, and in vacation the permission of a judge, to issue a writ of certiorari, it is obvious that it is no longer of right or as a mere matter of course that an indictment or presentment can be removed at the instance of the defendant. And to support his application there must be an *affidavit* entitled only "in the King's Bench," (x) shewing facts or circumstances sufficient to induce the Court or a judge to allow the writ. In general it will be granted on an affidavit shewing that there are or that the deponent has been advised by counsel that it is expected and believed that upon the trial matters of law and of doubtful decision and unfit to be decided by the inferior Court will arise, sometimes shewing the particular point, or that some of the justices at sessions are interested; (y) and any even slight ground for doubting a satisfactory trial or judgment below will in general induce the Court to grant the writ.

The statute 13 G. 2, c. 18, s. 5, relative to the time within which a certiorari for removing a conviction or order must be obtained, does not extend to indictments or presentments, (z) nor is there required any notice of the intended application. The *motion of counsel* should be made before issue joined and at the earliest opportunity, and at all events before conviction

(x) 1 B. & Cres. 267.

(y) 2 T. R. 89; 1 East, 303; 1 Ken-

yon's R. 135; Hand's Prac. 38, 352.

(z) R. v. *Bottoms*, 1 East, 208.

or judgment; (a) and if there be several defendants it must appear, by affidavit or by counsel for each defendant appearing, that all concur in the application. (b) The application may be made after a warrant has issued and recognizance to appear, even before indictment found; (c) and whenever a defendant is under a recognizance to appear at sessions to answer any indictment there preferred, if he fear that he would not there receive an impartial trial or proper judgment, he should *immediately* apply to the Court of King's Bench or a judge, on a full affidavit, to remove the recognizance and stay all proceedings, so as to secure a trial upon an indictment only at the assizes before one of the judges. (d) When the propriety of the removal, even upon the *ex parte* application of the defendant, appears clear, then the Court or judge will at once grant the writ and not a new rule nisi (to shew cause), which would increase the expense; though it seems that there must be a rule nisi before the removal by certiorari of proceedings before commissioners of sewers. (e) If there be an indictment to be removed, and the party be in custody and desire his removal to another prison, or to be bailed, there must also be an habeas corpus as well as the certiorari, for otherwise he must continue in the former prison. (f) After the Court has granted the writ of certiorari, in order to render it effectual the party should immediately follow it up and enter into the required recognizances each in £50, and a recognizance with two sureties each in £25 is not a compliance with the act. (g)

The great advantage and indeed real object of a removal by certiorari is, that the defendant thereby not only retains the right to object to the form of indictment and other proceedings, but he claims a complete investigation of the merits in the superior Court, or at least before one of the judges on the circuit; whereas, upon a removal of an indictment or presentment by writ of error, then only the *form* of the indictment, caption, and other proceedings upon the face of the record, and not the merits, can be questioned. (h) The trial may also be by special jury, who may have a view, and the defendant may have the assistance of king's counsel. The Court and the judge who tries the cause usually disapprove of the conduct of a defendant or prosecutor in removing an indict-

(a) *R. v. Pennegoes Mackynlleth*, 1 B. & C. 142; Hawk. b. 2, ch. 27, s. 30; 4 Bla. C. 321.

(b) *R. v. Hunt*, 2 Chitt. R. 130.

(c) MS. 60 G. 3, and 1 G. 4, c. 4, s. 4.

(d) In Oct. A.D. 1833, *R. v. Valentine*, a clergyman apprehended on a charge of unnatural practices, and under recogni-

zances to appear at sessions, Mr. Justice J. Parke granted a certiorari; and afterwards, at the assizes for Sussex, he was indicted and acquitted.

(e) 2 Chitt. R. 137, post, 380.

(f) *R. v. Thomas*, 4 M. & S. 442.

(g) *R. v. Dunn*, 8 T. R. 217.

(h) *R. v. Mackynlleth*, 1 B. & C. 142.

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writ of error.Coroner's in-
quests, &c.Of certiorari to
remove convic-
tions, orders,
&c.

ment for a common assault or trifling offence, on account of his thereby greatly increasing the expenses.

After judgment of an inferior Court upon an indictment or presentment, or coroner's inquest, &c. tried by a jury, the removal cannot be by certiorari, but must be by *writ of error*, upon which, we have seen, the *merits* cannot be discussed; (i) and such a writ of error must in all cases be returnable in the Court of King's Bench, (k) and there, after issue joined in error, the case is argued in full Court. But the attorney-general's *fiat* or authority for the issuing of such writ must be first obtained; (l) and though it is usually granted upon the production of a petition and a case with counsel's opinion or certificate that there is ground of error; yet sometimes the attorney-general, before granting his *fiat*, will require the prisoner's counsel to attend before him and state his objections and authorities in support of them. Where, however, there is reasonable doubt as to the sufficiency of the indictment or proceedings, it is not usual to refuse the *fiat*.

Although no party in particular be interested, yet as the king has an interest in the general administration of justice, and to prevent any abuse of the law standing as a precedent, the Court, on the application of the attorney-general, may by certiorari move and set aside a coroner's *inquisition* for apparent defect, and may declare a rule for that purpose absolute even in the first instance. (m) But this Court has no jurisdiction to try an indictment for *perjury* at common law, found at the sessions and removed by certiorari into the King's Bench, an indictment so found being void, as an indictment for perjury, excepting when founded on the statute of Elizabeth, can only be prosecuted in the Court of King's Bench or at the assizes, and a bill even cannot be found by a grand jury at sessions. (n)

It is a legal maxim that all *judicial* proceedings of justices of the peace, upon which they have decided by *conviction or order*, (such as an *illegal conviction* under the Building Act, or an *illegal order of justices* for turning an highway, (o)) and whether at general or special sessions, or individually, and either by general or particular statute, are of *common right removeable into this Court by certiorari*, unless that remedy has

(i) *Ante*, 373.(k) *Evans v. Roberts*, 3 Salk. 147; *Cornhill's case*, 1 Lev. 149; 1 Sid. 208, S. C.; Tidd, 1137.(l) *R. v. Wilkes*, 4 Burr. 2534, 2550; *Hawk. b. 2, c. 50, s. 13*; *Hand's Prac.* 48, 50, 462, 487; Tidd, 1141.(m) *In re Culley*, 5 B. & Adol. 230.(n) *Per Gaslee, J., R. v. Haynes*, 1 Ry. & M. 298; and see *Hawk. P. C. b. 2, c. 8, s. 64*; *R. v. Bainton*, 2 Stra. 1088; *Reg. v. Smith*, 2 Ld. Raym. 1144; *Reg. v. Yarrington*, 1 Salk. 406.(o) *R. v. Kent*, 10 B. & Cress. 477.

been *expressly taken away* by particular enactment; (p) and even where a statute declared that no other Court whatever should intermeddle with any *causes of appeal* upon that act, but that they should be *finally determined* in the quarter sessions only; yet it was decided that the Court of King's Bench was not ousted of its jurisdiction by certiorari, because the Court considered that such terms of enactment merely meant that the *facts* should not be examined. (q) On the other hand, an appeal (which is in the nature of a *new trial*, or reinvestigation of the *facts and merits*,) can never be sustained, unless it has been *expressly given* by some statute. (r) This writ, however, is for the removal of *judicial* acts, and not those merely *ministerial*, and therefore neither a mere order of Court, not constituting a final decision, nor a warrant of a justice, nor a recognizance, are so removeable. (s) And it has been the practice in the King's Bench not to grant a certiorari to remove an order of justices, from which an appeal lies to sessions, before the matter has been determined upon appeal, because the removal might take away that privilege, but when there is no restriction as to the time of appeal, it would be otherwise. (t)

The Court of King's Bench cannot take cognizance of or exercise their controuling jurisdiction over convictions, &c., unless they have been regularly brought before them *by writ of certiorari*, and where by inadvertence, the enactment presently stated had been disregarded, and a certiorari had not been issued within the six calendar months from the last preceding order or confirmation of a conviction, the Court had no jurisdiction, although in continuance of a former proceeding intended by them to be finally decided. (u) The certiorari to remove a conviction or order is in effect a writ of error, for the *facts* or

(p) *Ante* this volume 219, 220, 139, 142; *R. v. Moreley*, 2 Burr. 1040; *R. v. Jukes*, 8 T. R. 544; *R. v. Cashibury*, 3 Dowl. & Ry. 35; *R. v. Saunders*, 5 Dowl. & Ry. 611; 2 Selon's Pr. 618; *R. v. Middlesex*, 8 Dowl. & Ry. 117; *Burn's Jus. tit. Certiorari*.

(q) *R. v. Moreley*, 2 Burr. 1040; *R. v. Jukes*, 3 T. R. 542; Hawk. b. 2, c. 27, s. 23; what words take away the writ, *R. v. Middlesex*, 8 Dowl. & Ry. 117.

(r) *Ante* this volume, 215; *R. v. Surrey*, 2 T. R. 509; *R. v. Oxfordshire*, 1 M. & S. 448; *R. v. Hanson*, 4 B. & Ald. 521; *R. v. Cumberland*, 1 B. & Crea. 64.

(s) *R. v. Lloyd*, Cald. 309; *Sayer*, 6; *Loffy* 329.

(t) *Salk.* 147; *Cald.* 172.

(u) *R. v. Super*, 1 M. & S. 631; *ante*, 221; and *R. v. Smith*, King's Bench,

1834. A conviction under 5 G. 4, c. 83, s. 3, of defendant for deserting his wife, &c., was appealed against and quashed by sessions, Warwickshire, subject to a case to Court of King's Bench, granted on application of convicting justice, who thereupon removed proceedings into the King's Bench by certiorari, issued on his behalf. Court of King's Bench sent case back to sessions to be restated. Sessions, on argument, came to a different decision, and affirmed conviction, subject to a case; on argument of which, on 8th May, 1834, the King's Bench held that defendant should have obtained a fresh certiorari, and for want of it they had no jurisdiction, and it being too late under the statute to issue such certiorari, the defendant

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merits upon which the proceeding took place, cannot be discussed in the Court above, but merely the form and sufficiency of the proceeding as appear upon the face of them. (x) When the sessions on an appeal quashed a conviction for a supposed defect in form, without hearing the merits, the Court of King's Bench quashed the order of sessions, and sent back the case to the sessions to enter continuances and hear the appeal on the merits. (y)

Quære, if any remedy when certiorari taken away.

If the writ of certiorari has been expressly taken away by statute, and the conviction or proceeding be so formally correct on the face of it, as to afford an answer to any action of trespass, but yet was made under such strong circumstances of fraud or partiality as to render it unjust on the *merits* that it should be enforced, then *perhaps* on full affidavits and motion the Court of King's Bench might, by writ of *prohibition* or rule, *stay* the justice from proceeding to execution upon such unjust proceeding. (z)

Regulation of certiorari to remove convictions and orders.

In order to restrain the vexatious removal of convictions and orders, which issued as of course at common law, the statute 5 G. 2, c. 19; and 13 G. 2, c. 18, have been enacted, and which now regulate the proceeding. (a) The first act, sect. 1, after

(x) *R. v. Jukes*, 8 T. R. 542; *R. v. Liston*, 5 T. R. 358.

(y) *R. v. Ridgway*, 5 B. & Ald. 527.

(z) 2 Ld. Raym. 901; *Crepps v. Deuden*, Cowp. 640; 1 B. & Adol. 386 (u); ante this volume, 220, 221, *sed quære*, as to any jurisdiction of K. B.

(a) 5 G. 2, c. 19, s. 1, gives justices of the peace power to amend judgments and orders in matters of form upon appeal.

against an express enactment that the conviction should not be in any manner reheard, &c. Where, however, a justice or an inferior Court had no jurisdiction, then in order to quash a conviction, such a proceeding may be proper. *R. v. Justices of Somersetshire*, 3 Dowl. & Ry. Mag. Cas. 273.

Sect. 2 is thus: And whereas divers writs of certiorari have been procured to remove such judgments or orders (said to be confined to judgments or orders mentioned in first section, where an appeal is given. *R. v. Dunn*, 8 T. R. 218, *sed quære*.) into his majesty's Court of King's Bench at Westminster, in hopes thereby to discourage and weary out the parties concerned in such judgments or orders, by great delays and expenses, enacts, that no certiorari shall be allowed to remove any such judgment or order, unless the party or parties prosecuting such certiorari, before the allowance thereof, shall enter into a recognizance, with sufficient sureties, before one or more justices of the peace of the county or place, or before the justices at their general quarter sessions or general sessions, where such judgment or order shall have been given or made, or before any one of his majesty's justices of the said Court of King's Bench, in the sum of fifty pounds, with condition to prosecute the same at his or their own costs and charges with effect, without any wilful or affected delay, and to pay the party or parties in whose favour and for whose benefit such judgment or order was given or made, within one month after the said judgment or order shall be confirmed, their full costs and charges, to be taxed according to the course of the Court, where such judgments or orders shall be confirmed; and in case the party or parties prosecuting such certiorari shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall and may be lawful for the said justices to proceed and make such further order or orders for the benefit of the party or parties to whom such judgment shall be given in such manner as if no certiorari had been granted.

No certiorari to be allowed to remove justice's orders, without a recognizance of 50l. to prosecute to effect.

On refusal of recognizance, justices to proceed.

Recognizances to be certified into the King's Bench.

Sect. 3 enacts, That the recognizance and recognizances to be taken as aforesaid shall be certified into the Court of King's Bench at Westminster, and there filed with the certiorari and order or judgment removed thereby, and if the said order or judgment shall be confirmed by the said Court, the persons entitled to such costs for the

reciting the vexatious defeats on appeal to the sessions on mere defects of form, enables the sessions to amend them; and sect. 2 reciting that writs of certiorari have been procured to remove *judgments or orders* of justices of the peace, in hopes thereby to discourage and weary out the parties concerned by great delays and expenses, enacts that no certiorari shall be *allowed* to remove any such judgment or order, unless the party prosecuting such certiorari, before the allowance thereof, shall enter into a recognizance, with sufficient sureties, before a justice of the peace or justice of sessions, or before a judge of the King's Bench, in 50*l.*, conditioned to prosecute such certiorari with effect and without delay at his own cost, and to pay full costs, if the judgment or order shall be confirmed; and unless such recognizance be executed, the justices are to proceed and enforce the judgment or order; and sect. 3 directs that the recognizance shall be certified and filed with the certiorari and judgment or order thereby removed in the King's Bench, and if confirmed, the payment of costs is to be enforced by attachment.

The 13 G. 2, c. 18, s. 5, extends in terms to *all* convictions, judgments, orders, and other proceedings before justices, and prohibits any certiorari, unless applied for within six calendar months next after conviction, &c., reckoned from the date of the conviction, &c., (*b*) and six days' previous notice of the intended motion for the certiorari must be served on the justices, or two of them, so as to enable them to shew cause in the first instance, (*c*) and such notice must state the name of the party or parties intending to apply for the writ, (*d*) and all the parties

recovery thereof, within ten days after demand made of the person or persons who ought to pay the said costs, upon oath made of the making such demand and refusal of payment thereof, shall have an attachment granted against him or them by the said Court for such contempt, and the said recognizance so given upon the allowing of such certiorari shall not be discharged until the costs shall be paid, and the order so confirmed shall be complied with and obeyed.

13 G. 2, c. 18, s. 5. And for the better preventing vexatious delays and expense occasioned by suing forth writs of certiorari for the removal of convictions, judgments, orders, and other proceedings before justices of the peace, it is enacted, That no writ of certiorari shall be granted, issued forth or allowed, to remove any *conviction, judgment, order, or other proceedings*, had or made before any justice or justices of the peace of any county, city, borough, town corporate or liberty, or the respective general or quarter sessions thereof, unless such certiorari be moved or applied for within six calendar months next after such conviction, judgment, order, or other proceedings, shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing forth the same hath or have given six days' notice thereof in writing to the justice or justices, or to two of them, (if so many there be,) by and before whom such conviction, judgment, order, or other proceedings, shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari. All the parties must respectively sign the notice. 3 B. & Adol. 887; see also 60 G. 3; 1 G. 4, c. 4, s. 3 & 4; and see the notes Chitty's Col. Stat. 132, 133.

(*b*) *R. v. Boughey*, 4 T. R. 281; *R. v. Sussex*, 1 M. & S. 631, 734; *R. v. Kayle*, 1 Dowl. & R. 436; *Lofft*, 544.

(*c*) *R. v. Glamorganshire*, 5 T. R. 279.
(*d*) *R. v. Lancashire*, 4 B. & Ald. 289.

Attachment for contempt.

Certiorari, when and how to be applied for, viz. within six months, and after six days' previous written notice.

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The practice.

must respectively sign such notice, (e) and not merely an attorney or agent for them. (f)

In practice, after a conviction or order has been made or affirmed on appeal, application should be made to the justice or justices for a copy, and if from such copy it appear that the evidence and defence have not been duly set forth according to the facts, the magistrate should be required to correct his conviction; and if he should refuse, the facts should be fully stated in the subsequent affidavit in support of the motion to the Court of King's Bench. If the immediate payment of the penalty or fine be insisted on, and especially if a warrant has been issued, the same may be paid under protest. Then, before a motion for a certiorari directed to the convicting magistrate, it may be advisable to search and ascertain whether he has returned his formal conviction to the sessions, and examine the same there, if so filed. (g) Then a *written notice of motion* for certiorari should be carefully prepared, addressed to all the convicting justices by name, or at least two of them, referring to the conviction or order, and shortly stating with particularity the grounds of objection to the same, (so as to enable the justices to prepare to shew cause on affidavits in the first instance, (h)) the names and addition of the party objecting, and who will apply to the Court on a named day, or so soon after as counsel can be heard, and also naming the person or persons to whom the writ will be prayed to be issued. The notice must be signed by all the complaining parties, and not by one for himself and copartners, nor by an attorney or agent. (i)

The notice must be *served* full six days exclusive before the day when the motion to the Court is to be made, and it would be safer to serve at least two of the justices *personally*, (k) and from the concluding words of 13 G. 2, c. 18, s. 5, it would seem safer also to deliver a copy of the notice also, addressed to the prosecutor and parties concerned.

There must be an *affidavit*, entitled at most, "In the King's Bench," annexing and verifying a copy of the notice served, and stating the time and place and mode of service. (l)

An *affidavit* of the time of the conviction, and objectionable proceedings before the magistrate, the request to him to hear and state on his conviction the defence and evidence, and when the

(e) *R. v. Cambridgeshire*, 3 B. & Adol. 887; and see 60 G. 3 and 1 G. 4, c. 4.

(f) *Semble*, *id.*

(g) *R. v. Eaton*, 2 T. R. 285.

(h) *Per Cur. R. v. Lancashire*, 4 B. & Ald. 289.

(i) *R. v. Cambridgeshire*, 3 B. & Adol.

887. The form in 1 Burn J., tit. Certiorari, p. 592, therefore, seems defective. See a form, *ante*, 223, this volume.

(k) *Ante*, 177, this vol.

(l) *Ex parte Nohro*, 1 B. & Cres. 267; see form of *affidavit*, *ante*, 224, note (k), this volume.

fact, his refusal also, the subsequent request to him to amend his conviction in that respect, also all the particular objections, either to the irregularity of the proceeding or to the form of the conviction obtained from the justice, which should be verified and produced in court and referred to as annexed.

The *motion*, or application for the writ, must be made by counsel, within the prescribed time of six calendar months from the date of the order, or *time* of conviction, or order of confirmation at sessions on appeal, without regard to any delay in drawing up the conviction, or stating a case at the sessions for the opinion of the Court. (*m*)

The motion should be as well for a certiorari to remove the principal conviction or order, as also the original information, summons, warrants, and other proceedings and documents, and if the magistrate refused to set out the defence or evidence, a *mandamus* to compel him to set out and return the same, in his returned conviction, or shew cause to the contrary, may at the same time be prayed, and this is in general necessary. (*n*)

Although the statutes relating to *sewers*, and the jurisdiction of the commissioners, viz. 27 Hen. 8, c. 5, 2 W. & M. c. 8, s. 2, 7 Anne, c. 9, 7 Anne, c. 10, 18 G. 3, c. 16, 47 G. 3, c. 7, local and personal, and another local act for Westminster, passed 20th April, 1812, 7 G. 4, c. 64, s. 18, and 3 W. 4, c. 22, are silent on the subject of *appeal* or *certiorari* to the Court of King's Bench, yet as a part of its superintending power over most inferior Courts, this Court may, upon motion, supported by affidavit and by writ of certiorari, remove the proceedings of a *Court of Sewers*, and determine upon their legality, (*o*) as by examining the validity of a sewer's rate. (*p*) And it is frequently proper to proceed in King's Bench by certiorari, for a Court of Equity will not restrain the commissioners in proceeding to remove a float or tumbling bay upon a river, although it be suggested that it will be attended with irreparable mischief; (*q*) and though a Court of Equity has coextensive jurisdiction in some respects, yet an injunction against the commissioners of sewers reducing the height of water in a river, was dissolved on the ground that there was a shorter

Removal of
proceedings
before commis-
sioners of
sewers.

(*m*) *R. v. Sussex*, 1 Maul. & S. 734, 631; *R. v. Kaye*, 1 D. & R. 436; 4 T. R. 281; *R. v. Howlet*, 1 Wils. 35.

(*n*) *R. v. Marsh*, 4 D. & R. 264; *R. v. Rix*, *ibid.* 352; *ante*, this vol. 248.

(*o*) 3 Bla. Com. 55, 73, 74; *Callis* on Sewers; Com. Dig. tit. Sewers; Bac. Ab. tit. Courts of Commissioners of Sewers; Chit. Col. Stat. tit. Sewers, 879

to 887; *R. v. Commissioners of Sewers for Tower Hamlets*, 1 B. & Adol. 232.

(*p*) *R. v. Commissioners of Tower Hamlets*, 9 B. & Cres. 517; and 1 B. & Adol. 232.

(*q*) Cowp. Ch. Ca. 305; *Vesey* & *Beames*; Bac. Ab. Courts of Commissioners of Sewers.

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remedy in the Court of King's Bench, who interfere with great caution. (q) The course of proceeding to obtain the opinion of the King's Bench on the validity of a sewer's rate, is to make affidavits of the facts and objections to the rate, and thereupon move the Court for a rule to shew cause why a writ of certiorari should not issue, directed to the commissioners, to remove the objectionable proceedings into this Court, in order that the same may be quashed, stating the several grounds of objection in the rule nisi. The commissioners then make affidavits in answer and shew cause, and after argument the Court decide upon the rule nisi before any writ of certiorari is issued. (r) We have seen that in some cases a certiorari is granted in the first instance, but there must be a rule nisi in the first instance for a certiorari to remove proceedings from before the commissioners of sewers. (s) In general, in case of a presentment by a jury that a party is benefited by the sewers when he was not in fact so benefited, he should traverse the presentment, for if he neglect to do so, and a distress be levied, he could not sue the commissioners. (t) But in general an assessment upon a party who does not benefit will be void, and trespass for levying the rate would be sustainable. (u) In general, however, the safest course, when any objection to the commissioners' proceedings can be established by examination of them, is to move for a certiorari to remove them into the King's Bench, and move to quash them quia timet, so as to anticipate and prevent any injury. (x)

Jurisdiction upon cases stated by Courts of Sessions for the opinion of the Court relative to poor rates and assessments, settlements, and orders of removal, &c. (y)

Another very extensive and exclusive branch of jurisdiction, occupying much of the time of the Court, relates to the hearing and determining of cases stated by Courts of Sessions, upon appeals to them, usually upon the validity of poor rates, (z) or particular assessments therein, or upon a question of parochial settlement, and the validity of an order of removal; (a) but though cases are more usually granted or stated upon questions of parochial settlement or rating, they may be granted in all cases of orders and convictions, where the certiorari is not expressly taken away by statute. (b) Whenever the sessions

(q) *Kerrison v. Sparrow*, 19 Ves. 449; *Box v. Allen*, Dick. 49.

(r) *R. v. Commissioners of Sewers of Tower Hamlets*, 1 B. & Adol. 232.

(s) 2 Chitty's R. 137; ante, 373.

(t) *Warren v. Dix*, 3 Car. & P. 71.

(u) *Masters v. Seroggs*, 3 M. & S. 447.

(x) *Birket v. Croyner*, 3 Car. & P. 63; 1 M. & M. 112; and see other cases, *Burn J., tit. Sewers*.

(y) Anciently it was the practice to

state the facts especially in the order of sessions, and then refer them to the judges on the circuit, who had then more time than at present to consider them, *Burn J., tit. Poor*, 787.

(z) *R. v. Blackwater*, 10 B. & Cres 792.

(a) See in general *Burn's J., tit. Poor*, vi.; of Removal, 786 to 790.

(b) *R. v. Allen*, 15 East, 333.

upon appeal to them on these subjects, entertain a doubt upon the law as applicable to the facts disclosed upon the hearing of the appeal, they usually authorize the party against whom they decide to have their judgment reviewed by the Court of King's Bench, and this is called *granting a Case*. The justices at sessions are *not*, strictly speaking, *bound* to adopt this course, and ought not to do so when they are unanimous, and the point is free from doubt; and indeed in that case they *ought to refuse* a case, in order to prevent the delay and expense of further litigation. (c) But when there is reasonable doubt, they ought to raise a disputable question, in order that it may be decided by a higher tribunal, as well for the purposes of justice in the individual case, as also regarding precedent. (d) As, however, no bill of exceptions can be tendered with effect to the judgment of the justices, if they should peremptorily refuse a case, there is no remedy, even though perversely refused. (e) If the sessions have agreed to a case, then a mandamus may be issued to compel them to state it accordingly, unless it should appear that they have since so disagreed on the terms of the case itself, on account of some facts being in dispute, as to be unable to come to a conclusion on the facts themselves. (f)

When a case has been granted, either on a poor rate assessment, (g) or relative to a parochial settlement or order of removal, (h) it must be removed by certiorari into the Court of King's Bench, and if sent back to the sessions to be restated, must also be again removed by certiorari, or cannot be heard. (i)

But this Court will not take cognizance of a special case reserved upon the trial of an *indictment* at sessions, who are bound there finally to dispose of the prosecution, and have no power to delegate the decision on law or fact to this Court. (k) Nor has this Court any jurisdiction to review the judgment or decision of the quarter sessions, except on a case sent up

(c) *R. v. Darley Abbey*, 14 East, 285; Burn's J., Sessions of Peace, vol. v. 480. At the Middlesex Intermediate Sessions, on an appeal by Sir G. Acklam, Appellant, v. The Trustees of St. Luke's Parish, Chelsea, Respondents, 20th June, 1833, after hearing Bodkin for the Trustees and Clarkson for the Appellant, Mr. Broughton, the Chairman, (in answer to an application by Mr. Bodkin that a case might be allowed for the consideration and determination of the Court of King's Bench,) said it was not usual to grant a case when all the magistrates on the Bench were unanimous, and a case was refused.

(d) *R. v. Preston upon Hill*, Burr. Set. Cas. 77.

(e) *Ibid.*; *R. v. Oulton*, Burr. Set. Cas. 64; 1 Vent. 300.

(f) *R. v. Pembrokeshire*, 2 B. & Adol. 391; ante, vol. i. 793.

(g) *R. v. Oxford Canal Company*, 10 B. & Cres. 163; *R. v. Inhabitants of Barnes*, 1 B. & Adol. 113.

(h) Burn's J., tit. Poor, 786.

(i) *R. v. Sugar*, 1 M. & S. 631; and *R. v. Smith*, K. B. 1834; ante, 375, n. (u).

(k) *R. v. Inhabitants of Salop*, 13 East, 95.

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formally for their consideration. And therefore where the sessions, on an appeal, having heard the witnesses on one side, refused to hear those on the other side, on the ground that their testimony had been prefaced by observations on the part of counsel, contrary to their practice, the Court refused to grant a mandamus to rehear the appeal. (l) But it has been usual to reserve special cases upon *convictions* for penalties on an appeal to the sessions, when the certiorari or removal is not expressly taken away, as well as in cases of settlement; and the Court will take cognizance of this when accompanying the proceedings removed by certiorari into the King's Bench. (m) When one question only has on the face of the case been distinctly submitted to this Court, no other point will be considered, however apparent it may be on the facts stated. (n)

We have seen that anciently the judges on *their circuits* received cases from the sessions and decided upon them; but that practice has long been disused, in consequence of the great increase on the circuits of more important business. (o)

SECT. IV.

The constitution
and jurisdiction
of the Court of
Common Pleas.

SECT. IV.—*Of the Court of Common Pleas.*

We have seen that in the original formation or division of the Superior Courts it was intended that (with but very few exceptions) *all civil suits between subjects*, viz. *all real and mixed and personal actions*, should be instituted in this Court, and that only *criminal matters* should be prosecuted in the *King's Bench* and *revenue cases* in the *Exchequer*; that therefore Magna Charta enacted "Common Pleas shall not follow our Court (*i. e.* King's Bench), but be holden in a certain place." And the statute of Rutland enacted, that "no plea shall be held in the Exchequer, unless it specially concern the king or his ministers." But by the invention of the *latitat* in the King's Bench and the *quo minus* in the Exchequer, those two Courts assumed and ultimately established concurrent jurisdiction as respects personal actions, and also one mixed action, that of *Ejectment*. (p)

Real actions.

But we have seen that neither the Court of King's Bench

(l) *R. v. J. of Carnarvon*, 4 B. & Ald. 36; and *R. v. J. of Essex*, 2 Chitt. R. 585, *sed quære*.

(m) Tidd, 898, 899; *R. v. Allen*, 15 East, 333, 345; *R. v. Guildford*, 2 Chitt. R. 284.

(n) *R. v. Guildford*, 2 Chitt. R. 284;

sed quære.

(o) *Ante*, 362; Burn's J., tit. Poor, vol. iv. 786; *ibid.* tit. Sessions of Peace, vol. v. 480.

(p) 2 Sellon's App. 620, 612; Bacc. Ab. Court of King's Bench, A. 2, and *Id.* tit. Court of Common Pleas.

nor Exchequer has any jurisdiction over *real actions*, so that if such an action were commenced therein, the whole proceeding would be void and *coram non*; (*q*) and the Court of *Common Pleas* has exclusive jurisdiction over them, (*r*) excepting that the king has by prerogative a right to sue *his* real or mixed action in any Court. (*s*)

So whilst *fin*es and *recoveries* were in force, and still for many years to a certain extent, the practice relative to them, or rather limited to the *amendment* thereof, will be exclusively confined to this Court. (*t*) And the 1 W. 4, c. 70, s. 14 & 27, transferred the jurisdiction of the Courts of Great Sessions in Wales as to fines and recoveries, and the power of amending them, to this Court. And where the officer of the Court of Great Sessions had omitted to enter of record a recovery duly suffered there at bar in 1804, the Court of Common Pleas at Westminster ordered it to be done *nunc pro tunc*, under the 27th section of that act, on the ground that the power to *amend* implied such power to record. (*u*) And although the 3 & 4 W. 4, c. 74, s. 2, (*v*) enacts, that after the 31st December, 1833, no fine or recovery shall be levied or suffered, yet the 9th section saves and preserves the jurisdiction of this Court to amend any fine or recovery or any proceeding thereon. The act then substitutes more simple modes of assurance, and the 76th section empowers the Court of Common Pleas to make orders respecting the amount of certain fees connected with the new mode of conveyance, and powers as to the examination of a married woman respecting her consent to execute an indenture, are delegated to this Court, or rather the chief justice thereof, and the certificate of the examination and affidavit are to be lodged with an officer of this Court, and the Court of Common Pleas is empowered to make orders and regulations as to the mode of examination of married women respecting their consent, and the memorandums, certificates, affidavits and other proceedings. (*y*)

The Court of Common Pleas has also exclusive jurisdiction over all mixed actions, excepting actions of *ejectment*, which we have seen may be prosecuted in King's Bench, Common Pleas,

(*q*) *Ante*, Com. Dig. Court, B. 2, C. 1; 4 Inst. 199; 2 Sellen's Pr. 333; Roscoe on Real Actions; *Dally v. King*, 1 Hen. Bla. 1; Bac. Ab. tit. Court of King's Bench; and *Id.* tit. Court of Common Pleas.

(*r*) 2 Sellen, 620.

(*s*) *Ibid.* 620, 621.

(*t*) 4 Inst. 99; Com. Dig. Court, C. 1, 3 & 4 W. 4, c. 74, s. 9; Harrison's Index

tit. Fines, vol. i. 639; and tit. Recoveries, vol. ii. 373.

(*u*) *Frans v. Jones*, 9 Bing. 311.

(*v*) See the heads of the act, *ante*, vol. i. 311, 341 a, b, c, d, 2d. edit. in note, and the whole act in the Supplement of A.D. 1834.

(*y*) 3 & 4 W. 4, c. 74, s. 84 to 92; and see Rules, Trin. A.D. 1834, of Common Pleas thereon, 1 Bing. New Cases, 242.

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or Exchequer. *Quare Impedit* can only be sustained in this Court, excepting at the suit of the king, who may sustain that proceeding in any Court. (z) A writ of *dower* also, whether for the assignment of dower alone or for that and damages where the husband died seised, must be in this Court, or in the County Court by justices, or upon a special custom by plaint in the Court of the lord of the manor, but it is usually in this Court. (a) The ancient writ of waste to recover the property wasted, and now abolished, must also have been in this Court. (b)

The 11 G. 4, and 1 W. 4, c. 70, s. 14, and the 1 W. 4, c. 3, s. 4, enacted, that writs of right and other *real* actions then depending in the Courts of Session for Chester and Wales, should be heard and determined in the Common Pleas, and all subsequent real actions arising in those districts must be brought in this Court. But any continuing increase of business attributable to that change was soon destroyed by the 3 & 4 W. 4, c. 27, s. 36, repealing, after the 1st June, A. D. 1835, all the real and mixed actions and writs of partition therein enumerated, (excepting writs of right, of dower, *quare impedit* or ejectment, and plaints in Manor Courts for free bench;) and by another enactment putting an end to fines and recoveries hereafter to be passed or suffered in the Court of Common Pleas. (c) So that by the ancient contrivances and invasions of jurisdiction before alluded to on the one hand, and this repeal of its exclusive branch of jurisdiction over real and mixed actions on the other, this superior and excellently constituted Court has been greatly abridged of jurisdiction, and no sufficient arrangement for an increase of other business has been made, although considering the peculiar learning of the judges of this Court and of the serjeants, it would have been well to have restored much if not the whole of the ancient exclusive jurisdiction over all actions of ejectment, and all questions relative to real property and conveyancing, and incidentally relating to parochial settlements in respect of estate, which it will be seen frequently involve many difficult questions relative to those subjects. By such restoration would be encouraged and more highly cultivated depth of learning on those subjects, which, in the other Courts, at present are sometimes too hastily and insufficiently examined, and would certainly tend to cause an improved administration of justice on those very important subjects.

In order, in some measure, to compensate the subtraction

(z) *Ante*, Fitz. Nat. Brev. 32 c; 2 Sell. Pr. 321.

(a) 2 Sell. Pr. 291.

(b) 2 Sell. Pr. 338; *Harrow School v.*

Anderton, 2 Bos. & Pul. 86; *Green v. Cole*, 2 Saund. 252.

(c) 3 & 4 W. 4, c. 74.

of business which the Court of Common Pleas has of late, without reason, sustained, it is highly expedient that the Courts of Equity should send their *Cases* for opinion to the judges of this Court, and direct their *issues* on questions of fact to be tried in this Court in preference to that of the King's Bench, where the press of business, owing to its more multifarious jurisdiction, frequently causes an inconvenient accumulation and arrear of business. (*d*)

Although not strictly connected with the *jurisdiction* of this Court, yet as materially affecting the practice of those learned serjeants who had resolved to devote themselves principally to this Court, it may be proper here to notice that it was originally proposed to abolish the exclusive privilege of the serjeants by act of parliament; but afterwards it was ascertained that the same object might be effected by the king's warrant, and, accordingly, on the 25th April, 1834, a warrant, under the king's sign manual, was issued, and under which, after reciting that it had been represented to his majesty that it would *tend to the general despatch of the business* depending in the several Courts of law at Westminster, if the right of counsel to practise, plead and be heard, be extended equally to all the said Courts, the Court of Common Pleas, in and after Trinity Term, A. D. 1834, was opened to all barristers, whether serjeants or not; and all barristers have an equal right and privilege to practise in this Court; but by the same warrant it was declared, that several serjeants therein enumerated shall rank next after the junior king's counsel, but such privilege is not to extend to any serjeant that might thereafter be made. (*e*). The terms of the warrant are, "Whereas it hath been represented to us that it would tend to the general despatch of the business now pending in our several Courts of Common Law at Westminster, if the right of counsel to practise, plead and be heard, were extended equally to all the said Courts; but such object cannot be effected so long as the serjeants at law have the exclusive privilege of practising, pleading and audience during term time in our Court of Common Pleas at Westminster: we do, therefore, hereby order and direct that the right of *practising, pleading and audience* in our said Court of Common Pleas during term time, shall, upon and from the first day of Trinity Term now next ensuing, cease to be exercised exclusively by the serjeants at law; and that upon and from that day our counsel learned in the law and all other barristers at law, shall and may, according to their

Exclusive privilege of the serjeants abolished, and the Court opened in *Banc* to all barristers. (*e*)

(*d*) See *ante*, 350 to 353.

(*e*) See Warrant, 10 Bing, 371; Legal

Observer, vol. vii. 527, and vol. viii. 13.

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respective rank and seniority, have and exercise equal right and privilege of *practising, pleading and audience* (f) in the said Court of Common Pleas at Westminster with the serjeants at law. And we do hereby will and require you to signify to Sir Nicholas Conyngham Tindal, Knt. our Chief Justice, and his companions, justices of our said Court of Common Pleas, this our royal will and pleasure, requiring them to make proper rules and orders of the said Court, and to do whatever may be necessary to carry this our purpose into effect."

Habeas corpus, (g)

In case of illegal imprisonment the Court of Common Pleas in term time, or one of its judges in vacation, has now equal and concurrent jurisdiction with the Court of King's Bench, to issue a writ of *habeas corpus* under 31 Car. 2, and 56 G. 3, c. 100, already noticed. (h) To this Court appertains, as it did also to the Court of Exchequer, the right at *common law*, where any officer of the Court, or any party to a suit in that Court, was imprisoned, to grant this writ; and if it appeared that the party was illegally detained, to discharge him; (i) but before the above acts, if it appeared that the party was confined for a *criminal* matter, neither this Court nor the Court of Exchequer could proceed to investigate the charge, but were bound to remand him; or else if the offence was bailable, to take bail for his due appearance in a Court of criminal jurisdiction. (k) Now by the former act, "it shall be lawful for any prisoner to move and obtain his *habeas corpus*, as well out of the High Court of Chancery or Court of Exchequer, as out of the Court of King's Bench or Common Pleas, or either of them; and if the Lord Chancellor, or Keeper, or any judge or judges, baron or barons, for the time being, of the degree of the coif, of either of the Courts aforesaid, in the vacation time, upon the view of the warrant of commitment or detainer, or upon the oath made that such copy was denied, shall deny any writ of *habeas corpus*, by the said act required to be granted as therein mentioned, they shall severally forfeit 500*l.* to the prisoner or party aggrieved;" (l) so that under these two acts the Court of Common Pleas and Exchequer, though properly neither has any *criminal* jurisdiction, is bound, if required, to

(f) These terms are so comprehensive that no doubt they extend to the *signature of pleadings* and every other description of business that serjeants could practise. It will be observed that this rule removes the inconvenience before noticed respecting motions for a new trial in the Court of Common Pleas, *ante*, 323.

(g) See in general *ante*, vol. i. 604 to 605; and this vol. *ante*; Bac. Ab. tit.

Court of Common Pleas; and tit. *Habeas Corpus*; Com. Dig. tit. Courts C.; 31 C. 2, c. 2, s. 10; 56 G. 3, c. 100; *Wood's case*, 3 Wils. 172.

(h) *Ante*, 327, 328.

(i) Bac. Ab. *Habeas Corpus*, B. 1.

(k) *Id. ib.*; but see 2 Sellow, 621; *Wood's case*, 3 Wils. 172; *Bushel's case*, Vaughan, 155; 2 Hale's P. C. 144.

(l) 2 Sellow's Pr. 621.

exercise the power of discharge or bailing in criminal cases. It is, however, as we have seen, much more usual to apply to the Court of King's Bench, or one of its judges, for discharge from imprisonment, or bailing upon any *criminal* or other charge unconnected with the process of the Court of Common Pleas; (*m*) and this, as we have seen, even when the party is in custody for some alleged offence against the revenue laws, properly cognizable in the Court of Exchequer. (*n*)

The statutes relative to arbitration and *awards*, giving summary jurisdiction to the Court of King's Bench, equally extend to this Court. (*o*) And the *annuity acts*, 17 G. 3, c. 26, and 53 G. 3, c. 141, s. 6, also extend to the Courts of Common Pleas and Exchequer, and authorize each, when an action on the annuity deed is brought thereon, or when the warrant of attorney authorizes a judgment to be entered up in this particular Court, to interfere on motion. (*p*) And whenever, as one of the securities, there is a warrant of attorney authorizing a judgment *only* in this Court, then a motion to set aside the security *must* be made in this Court, unless in cases within the 6th section, and when it is more probable that the Court of King's Bench will set aside the deeds, without imposing any terms on the debtor. (*q*)

The statute 7 G. 2, c. 20, as to summary applications for relief by *mortgagors*; (*r*) the 11 G. 2, c. 19, s. 17, as to summary appeal by *tenants* against the proceedings and record of justices of the peace, and to obtain restitution; (*s*) and the statute 4 Ann. c. 16, s. 20, and 11 G. 2, c. 19, s. 23, as to *Bail bonds* and *Replevin bonds*, (*t*) equally extend to the Court of Common Pleas, and enable that Court also to afford relief; and the observations upon the jurisdiction of the Court of King's Bench affecting those subjects will here in general equally apply to the jurisdiction and practice of this Court.

This Court also has original summary jurisdiction by rule of Court and *attachment* over its *own officers* and ministers, and all other persons guilty of contempt against the Court itself, or its rules or orders; (*x*) and by a rule of Hilary term, 14 J. 1, the Court may remove unfit or even *unskilful* attorneys. We have seen that the lien of an attorney is less favoured in

Awards.

Annuities.

Mortgagors,
tenants, bail
bonds, replevin
bonds, &c.Attorneys and
officers. (*u*)(*m*) Tidd, 28.(*n*) Ante, 327.(*o*) Ante, 328.(*p*) Ante, 329.(*q*) Ante, 338.(*r*) Ante, 331.(*s*) Ante, 361.(*t*) Ante, 333.(*u*) See fully, ante, 358.

(1) See ante, 338; 4 Inst. 100; Com. Dig. Courts, C. 1; Tidd, 38; Kilbey v. Weyberg, 12 Mod. 251; Worley v. —, id. 318; Anonymous, id. 440; Anonymous, id. 583; Craddock v. Glin, id. 657.

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this Court than in the King's Bench, and that therefore this Court will permit cross actions or interlocutory orders for costs to be set off against each other, even in prejudice to the attorney's lien, (y) a distinction which may induce a plaintiff's attorney in some cases to prefer the Court of King's Bench to this Court. (y)

Prohibition.

With respect to any controuling jurisdiction over inferior Courts, it was determined by all the judges that this Court, as well as the King's Bench, has jurisdiction by *prohibition* to confine temporal as well as ecclesiastical Courts within their proper jurisdiction; (z) but it is more usual to apply to the Court of King's Bench for that writ in term, (a) or to the Chancellor in vacation, if an inferior Court should then press forward in a suit over which it has not proper jurisdiction. (b) And we have seen that it has been decided that this Court has no jurisdiction by prohibition to restrain a bishop from committing waste. (c)

Removal of proceedings from inferior Courts.

Before judgment the Court of Common Pleas always removed the *civil* proceedings of an inferior Court, even of record, by certiorari or habeas. (d) But a *writ of error* does not lie *after* judgment from an inferior Court of Record into this Court. The decisions and treatises are at variance upon this point; but this is certainly the result. (e) However, all proceedings in Courts *not of record* are removeable *before* judgment into the Common Pleas by pone or recordari facias loquelam or accedas ad curiam, or *after* judgment by writ of false judgment. (f)

No indictment or presentment, or conviction or order, or matter of a public nature, can be removed by certiorari or other

(y) *Ante*, 321.

(z) Vaughan's R. 157; *Robert's case*, 12 Coke, 68; 4 Inst. 92, 99; Bac. Ab. Court of Common Pleas; 2 Sellon, 128, 621; 1 Woodes. Vin. Lec. 116; Tidd, 38; and 1 W. 4, c. 21; Impey's Pr. C. P. 4, *ante*, 355.

(a) In *Ex parte Dr. Battine*, 4 B. & Adol. the Court of Common Pleas had been previously applied to without success.

(b) 7 Ves. 257; 2 Sch. & Lef. 136; Com. Dig. Chancery, Appendix, tit. Prohibition.

(c) *Ante*, 359, *post*, *Ecclesiastical Jurisdiction*.

(d) Tidd, 38; 1 Leb. Ab. 505; but see 2 Sellon, 621; 3 Bla. Com. 410, 411, note (p); Finch L. 480; *Ap Richards v. Jones*, Dyer, 250; *Roe v. Harth*, Cro. Eliz. 26.

(e) 2 Sellon, 621; Tidd, 1138; Finch L. 480; *Ap Richards v. Jones*, Dyer, 250a; and *Roe v. Harth*, Cro. Eliz. 26, where the report is thus: "It was held by all the justices that a writ of error doth not lie in the Common Pleas upon an erroneous judgment given in any Court of record, and this, as they said, on great advice;" see also 3 Bla. Com. 410; Impey, Common Pleas, 752, *accord*.; but see Tidd, 38; Bac. Ab. Error, I. 5, *contra*. In compensation for the great invasions on the jurisdiction of this Court, it would be a salutary enactment that all writs of error, false judgment, and all proceedings for reinvestigating the decisions or acts of *inferior Courts*, were returnable and decided in this Court, and afterwards, if any further appeal were allowed, then into Exchequer Chamber.

(f) 2 Sellon, 621; Tidd, 38.

proceeding into this Court, nor has it any jurisdiction to issue a *mandamus*.

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Nor has this Court any jurisdiction over or in relation to crimes, (g) or as it is technically said this Court has no crown side; (g) and they will not even give time *to put in bail* so as to await the decision of the judges, on an indictment against the defendant. (h) Though the Court of Common Pleas and Exchequer have enlarged the *time for rendering* the principal, when he is in custody upon a criminal charge, (i) and the King's Bench will discharge the bail when the principal is under sentence of transportation. (k)

Not over crimes.

SECT. V.—Of the Court of Exchequer of Pleas, &c.

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The Court of EXCHEQUER, as originally constituted, was a Court of Record merely for the hearing and determining of matters relating *to the revenue of the Crown*; (l) and in many respects revenue questions must exclusively be heard and determined either on the common law or equity side of this Court and not in Chancery; (m) and hence it is supposed by other Courts that this Court is *more eligible* for the decisions upon revenue questions, and may be so, subject to the possibility of bias in favour of the crown. (n) The Exchequer was originally divided into *eight* distinct Courts—as 1. *The Court of Pleas*, (still the proper *Law Court*); 2. *The Court of Accounts*; 3. *The Court of Receipt*, which was considered the true centre, into which all the king's revenue and profit ought to be paid; (o) 4. *The Court of Exchequer Chamber*, being the assembly of all the judges of the superior Courts for matters of law; 5. *The Court of Exchequer Chamber*, as erected by 31 E. 3, c. 12, for errors in judgment of the Court of Exchequer of Pleas itself; 6. *The Court of Exchequer Chamber* for errors in the King's Bench, and erected by 27 Eliz. c. 8, (now by 1 W. 4, c. 70, s. 8, the only Court of Error as well from King's Bench, Common Pleas and Exchequer of Pleas); 7. *The Court of*

The Exchequer and its several Revenue and Law Courts.

(g) Hawk. b. 2, ch. 1, s. 1; Bac. Ab. Courts, A., 5 Taunt. 503; Tidd, 478.

(h) *Joyce v. Pratt*, 6 Bing. 377.

(i) *Post*, 403; *Bennett v. Kinnear*, 3 Moore, 259; *Attorney-General v. Phillips*, 13 Price, 523; and see Price's Prac. 93, 105 to 118.

(k) Tidd, 289 to 297; Supplement, 82.

(l) 4 Inst. 103, 119; *Mad. Exch.*, 109, 121; *Vin. Ab. Courts of Exchequer*, O.;

Com. Dig. Courts, D. where the jurisdiction of each of these Courts is separately stated.

(m) 3 Bla. Com. 428, 429; *post*.

(n) 7 T. R. 174; 1 Taunt. 120; Tidd's Suppl. 188; *ante*, 327, 328.

(o) 2 Inst. 197; see an excellent modern view of that Court, and an account of the office of the Lord Treasurer's Remembrancer of and in the Exchequer, 2 *Mau. Exch. Pr. Appendix*, 249, &c.

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Equity in the Exchequer Chamber, of which the Lord Treasurer and the Chancellor and Barons of the Exchequer were the judges, (p) and still continued and improved by the recent acts, 57 G. 3, c. 18, and 3 & 4 W. 4, c. 41, s. 25 & 27; 8. The Court of *First Fruits and Tenths*, erected tempore Hen. 8, but which was dissolved and the clergy discharged thereof by 2 & 3 P. & M. c. 4. By 1 Eliz. c. 4, the first fruits and tenths were reunited to the crown, and although this ancient Court itself was not revived, yet such first-fruits and tenths were placed within the rule, survey and government of the Exchequer, (q) and the circumstance of such first fruits and tenths being cognizable especially in the Exchequer, gave rise also to *suits for tithes* being anciently there instituted; and as the Court had become particularly conversant with tithe law, it has ever since been the practice to prosecute tithe suits in the Exchequer in preference even to the Court of Chancery, (r) though in the latter Court the decree is more extensive than in the Exchequer, viz. by compelling the defendant to account for his tithe to the time of the decree or even to the time of the master's report, whilst in the Exchequer the decree only compels account to the time of filing the bill. (s) If the owner of the tithe proceed by bill in equity or in the Exchequer, he must waive all actions for penalties for not setting out tithe. (t) Suits in the Exchequer for tithe are now usually on the equity side of this Court; (u) they are preferable when the litigation is with several parishioners, and when, if the tithe owner were to proceed at law, numerous actions would be necessary; but when there has been *an agreement* between the tithe owner and a particular parishioner to pay a composition in lieu of tithe, and there is an arrear due under the agreement, or when predial tithe (not agistment) has not been set out, and the treble value of such tithe will be more than sufficient to defray all the costs at law, then an action of debt for treble or single value is in general preferable.

The Exchequer
of Pleas, (x)

The first specified Court, viz. *The Court of Pleas*, is the Exchequer Court of *Law*, and was properly and anciently the Court in which debts or duties to the king were to be recovered, usually by *information* by the attorney-general, and *actions* by and against the officers of this Court, and the king's actual

(p) 4 Inst. 118; Bac. Ab. Court of Exchequer.

(q) 4 Inst. 120; Plowd. 377, 542.

(r) 3 Atk. 247; and see 1 Mad. Ch. Pr. 104, 105.

(s) 2 Atk. 137; 1 Mad. Ch. Pr. 105.

(t) 1 Mad. Ch. Pr. 108; 1 Vern. 60; 1 Anstr. 100.

(u) 2 Man. Exch. Pr. 508, 509.

(x) See its jurisdiction in general, Com. Dig. Courts, D. 2.

debtors, and against actual prisoners in the Fleet Prison of the Court, were always sustainable in this Court. Magna Charta prohibited real, mixed and personal actions to be brought elsewhere than in the Common Pleas, and the statute of Rutland, 10 Ed. 1, in affirmance, as is said, of the common law, enacted that "*no plea shall be held in the Exchequer unless it specially concern the king or his ministers.*" (y) But under the fiction that a party was the king's minister or debtor, and that by the defendant's withholding the debt or having committed the injury, the plaintiff was *less able* to pay the king, jurisdiction was assumed and established over all private claims in personal actions between subject and subject, although in truth neither was an actual debtor to the king. (z) In some cases also a preference was by this means given to the Court of Exchequer, as in debt on simple contract; wager of law was not allowed in this Court, and the process of venire did not require personal service; and we have seen that the jurisdiction of this Court in personal actions is at least impliedly recognized by the act establishing a uniformity of process; (a) and it is not now even necessary, or indeed proper, in a declaration in the Exchequer, to allege that the plaintiff is a debtor to the king, any more than it is now necessary or proper in the King's Bench to state that the defendant is in the custody of the marshal, unless that be the fact. (b) It was, however, considered that a plaintiff cannot proceed in this Court by *original writ* from the Chancery returnable here. (c).

In this Court a plaintiff has four terms in which to enter a common appearance for the defendant, under 12 G. 1, c. 29, s. 1, an advantage in favour of a plaintiff's proceeding here. (d) It has been supposed by some that this Court *adopts* the practice of the King's Bench, and by others that of the Common Pleas, (e) but these suppositions are equally erroneous, for the barons are wholly independent excepting of their oath, and which binds them to decide and act according to their *own independent opinions*, though the previous decisions of their own or any other Court upon the terms of a statute or general rule, or upon a general matter of practice, which ought to be similar

(y) 4 Inst. 113, 114; Plow. 209; Stoke, 20.

(z) Bac. Ab. Court of Exchequer; 4 Inst. 112; 3 Bla. C. 44; 2 Sell. Pr. 1 ed. 599, 600.

(a) Ante, 2 W. 4, c. 39; 3 & 4 W. 4, c. 67, s. 1.

(b) *Hirst v. Pitt*, 3 Tyrw. R. 264; 1

Crompt. & Mee. 324.

(c) 1 Price R. 309; Tidd, 38.

(d) *Cook v. Allen*, 3 Tyrw. 378; contra to practice of King's Bench, where the appearance must be within two terms, 10 B. & C. 437.

(e) Price Pr. Advertisement, vii.

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When the jurisdiction of the Exchequer is *exclusive*.

in all the Courts, will doubtless be considered with the best attention before they will be departed from. (*f*)

We have seen that in some cases even of personal actions this Court has *exclusive* jurisdiction, as where the king's revenue is concerned, or an action has been brought in another Court against a revenue officer for something done or omitted by him connected with his office, and when we have seen the proceedings may be removed into this Court. (*g*) So by the Lottery Act, 36 G. 3, c. 104, s. 38, when in force, actions for penalties must have been commenced and prosecuted in the Exchequer. And, in general, *penalties* incurred under the Stamp Acts must be sued for by and in the name of the attorney-general or in the name of the solicitor or some other officer of the stamps, and usually in this Court. (*h*)

Not in real or mixed actions excepting ejectment.

But this Court has no jurisdiction over *real* or mixed actions, excepting in *ejectment*, which was acquired by fiction of the plaintiff being a debtor, though at what time does not appear. (*i*) In one case of ejectment this is the only proper Court in which to proceed, as if A. have the title to lands under an extent out of the Exchequer for debts in aid, he must bring his ejectment for them in this Court, and having brought his ejectment for them in the Court of Common Pleas, he was, on motion, ordered to prosecute here. (*k*) So if A. be outlawed at the suit of B., and lands in the possession of A. are extended, and C. claims title to them, and pleads to the inquisition, he must bring an ejectment for them in this Court and not elsewhere, because the king's revenue is deemed to be concerned. (*l*) And indeed in all suits in another Court, if it appear from the pleadings that the revenue is concerned in the event, the cause may be, as we have seen, removed into the Office of Pleas. (*m*)

Feigned issues.

Feigned issues, or other issues, are also properly framed and triable on the plea or law side of the Exchequer, but by plea only, and not even then merely on motion; (*n*) and an issue will not be directed to be tried in the Exchequer unless for some special reason and on motion for that purpose. (*o*) And regularly these are only the result of some summary application to the Court when the affidavits are contradictory. (*p*) or are

(*f*) And see *Doe v. Fry v. Fry*, 2 Crompt. & M., 234, as to the practice of the Court of Exchequer probably changing and becoming assimilated to that of the other Courts in like cases.

(*g*) *Ante*, 316, 317.

(*h*) 44 G. 3, c. 98; 5 G. 4, c. 41.

(*i*) 2 Man. Ex. Pr. 504.

(*k*) Hardr. 193, 176; and see 2 Vern.

146; Bac. Ab. Court of Exchequer.

(*l*) Hard. 176.

(*m*) *Lamb v. Gunman*, Parker's Rep. 143; *ante*, 316, 317.

(*n*) 2 Man. Ex. Pr. 505; 4 T. R. 402; 12 East, 247.

(*o*) *Antrobus v. E. I. Company*, 5 Mañ. Rep. 3.

(*p*) 2 Man. Ex. Pr. 505; 6 Taunt. 75.

framed under the authority of an inclosure or other act, or they are sent from the equity side of the Court of Exchequer or from Chancery. (q)

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With respect to the *summary jurisdiction* of this Court, as in cases of awards, annuities, mortgages, bail bonds, replevin bonds, &c. over which we have seen the Courts of King's Bench and Common Pleas have jurisdiction on affidavits and motion, the statutes giving such jurisdiction in general equally apply to this Court. There are, however, singular exceptions as to *summary applications*, as well under the fifth section of the Annuity Act, 53 G. 3, c. 141, which only in terms authorizes a judge of King's Bench or Common Pleas to compel the production of the original deed; and it seems that an application by a tenant against the decision and record of justices of the peace, and to obtain restitution under the 11 G. 2, c. 19, s. 17, only extends to the Courts of King's Bench and Common Pleas, and not to this Court. These two exceptions historically shew that the legislature did not, at the time those acts were passed, treat the Court of Exchequer as a Court of law for the decision of private rights between subject and subject, though undoubtedly by the fiction of *quo minus* this Court had long before contrived to exercise jurisdiction in those cases.

Summary jurisdiction.

The *Habeas Corpus* Acts, 31 C. 2, c. 2, and 56 G. 3, c. 100, expressly extend to the Court of Exchequer and the barons thereof; but when the party is in custody under a *criminal* charge, it is, we have seen, more usual to apply for the writ and discuss the legality of the imprisonment in the Court of King's Bench; (r) and when a party is in custody under any irregular process upon a *revenue* charge, it is always better for him to apply to the Court of King's Bench than to the Court of Exchequer, for reasons before assigned. (s)

Habeas corpus.

The Court has jurisdiction over warrants of attorney, authorizing a judgment in this Court; and though it has been decided that by the practice of this Court, contrary to that of King's Bench and Common Pleas, the Court of Pleas will not interfere to set aside a warrant of attorney on the ground of illegality, but the defendant must apply for relief to the equity side of this Court, (t) the present practice is otherwise. But

Warrants of attorney.

(q) 2 Man. Ex. Pr. 505, and cases in note (r).

(r) *Ante*, 327.

(s) *Ante*, 327, 328.

(t) *Matthews v. Lewis*, 1 Anstr. 7; 2 Man. Ex. Pr. 500, note (i), but who judiciously adds *tamen quare*.

Matthews v. Lewis, 1 Anstr. 7. Partidge and King moved for a rule to shew cause why the judgment entered up by the plaintiffs should not be set aside, on the ground of usury, which was disclosed by affidavits.

By the Court.—To set aside judgments

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Jurisdiction
over its officers
and attorneys
practising
there.

Practice in out-
lawry.

a judgment cannot be entered up in the Exchequer on a warrant of attorney to confess judgment in a Court of Great Sessions, because the statute 1 W. 4, c. 70, speaks only of the removal of *suits*, and a warrant of attorney, although authorizing a *suit*, cannot in itself be deemed a *suit*. (*u*)

This Court has a jurisdiction over its own officers and attorneys, similar to the Courts of King's Bench and Common Pleas; (*x*) and it seems also to have had summary jurisdiction over an attorney of another Court, who practised in the Exchequer in the name of a side clerk before the late act. (*y*)

We have sufficiently noticed the privilege of officers of the Court of Exchequer, and of all revenue officers, to have actions against them removed into and proceeded on in this Court. (*z*)

Although an original writ out of Chancery could not nor can be returnable in this Court so as to proceed to outlawry at the suit of a subject for debt; (*a*) the uniformity of process act, 2 W. 4, c. 39, s. 56 and 57, now expressly authorizes proceedings to outlaw upon a *capias* or *distringas* issued under that act; and the seventh section enables the chief baron to appoint an officer to execute the duties of a filazer, exigenter, and clerk of the outlawries in this Court. (*b*) And though an affidavit as to the attempt to serve a defendant with process may not be sufficient to warrant a *distringas* to take his goods, or to entitle the plaintiff to enter an appearance for the defendant, yet it may suffice to authorize the Court to issue a *distringas* for the purpose of proceeding to outlawry. (*c*) And upon a judgment of outlawry in the King's

of this kind is to usurp the office of a Court of Equity by the summary jurisdiction of a Court of Law. It may be necessary at least to direct an issue to try the validity of the transaction, which a Court of Law cannot compel, and the introduction of this second innovation in the practice, rendered necessary by the first, shews how dangerous it is to confound the jurisdictions of the different Courts. The regular process of a Court of Equity seems in every respect the best adapted to this case, for the plaintiff is entitled in conscience to the money he has really advanced, and if we set aside the judgment, he loses that with the rest; a Court of Equity, on the other hand, decrees what is really due, and no more; (but see now otherwise, 17 Ves. J., 44, and *ante*, 337 (*z*)). The Court of King's Bench has granted such motions, perhaps, that is now become so much the practice of the Court as not to be disputed *there*; but in this Court no such precedent has been established, and we do not see any rea-

son to make one. Besides, this is nothing like usury. It is a catching bargain, an extorting post orbit, but no usury.

The rule was refused.

(*u*) *Williams v. Williams*, 1 Tyr. R. 351.

(*1*) *Ante*, 337.

(*y*) *Evans v. Duncan*, 1 Tyr. 283; 1 Crompt. & J. 372.

(*z*) *Ante*, 316, 317; and see *R. v. Pickman*, 3 Anst. 852; *Beddingfield v. Shelford*, 8 Price, 584.

(*a*) *Horton v. Peake*, 1 Price R. 309; 1 Tidd, 38, 132, Supplement, 100; Dax, Pr. Ex. 84; Price Pr. Exc. 52; see 2 Dowl. Stat. 2 W. 4, c. 39, and notes.

(*b*) And see 2 & 3 W. 4, c. 110, s. 149; Tidd's Supp. A. D. 1834, p. 100.

(*c*) Per Ld. Lyndhurst, C. B., and Bayley, B., in *Hewitt v. Mellor*, 3 Tyrw. 822; 1 Crompt. & Meeson, 720; the form of the note at the foot of the writs different in such case, see No. 3, sched. 2 W. 4, c. 39, and post.

Bench, a motion may be made and rule obtained in this Court for a sequestari facias to sequester the profits of two benefices, the writ of capias utlagatum, with the returns, being filed in the Exchequer, and the profits of the benefices vested in the crown; and writs in the nature of sequestari facias to the bishop being required, whereupon the bishop will provide for performance of the duty. (d) In case of an outlawry in any Court, it is the course of the Exchequer to prefer an information in nature of trover and conversion against any person who has the goods of the outlaw; (e) and though the proceedings in the Courts of King's Bench and Common Pleas are not in general subject to revision in the Exchequer of Pleas, yet it appears that erroneous outlawries in those Courts may, on account of the king's interest therein, be vacated in this Court. (f) And therefore where an outlaw had died abroad before a treasury warrant and the attorney-general's consent had been granted in order to authorize the sheriff to pay over money in his hands under a capias utlagatum to the plaintiff in the action, it was held that that warrant and consent granted in ignorance of the previous death, did not vest the money in the plaintiff, and the Court on motion of the defendant's executors, stayed payment over to the plaintiff by the sheriff till their plea of defendant's death should be traversed and the facts tried. (g)

It is also laid down, that although it is more usual to proceed in the Court of King's Bench upon informations in the nature of quo warranto, to try the right of particular persons to hold offices in corporations, or to exercise other franchises, yet that a writ of quo warranto also lies in the Exchequer; (h) and an information in the nature of a quo warranto may be exhibited in the Exchequer in the name of the attorney-general, although that Court is not mentioned in 9 Anne, c. 20. (i) The proper course in the Exchequer, it is said, is to issue a writ to the sheriff, directing him *generally* to inquire into usurpation of franchises; upon which he is to take an inquisition finding the particular usurpation intended to be drawn in question; and then the defendant is to traverse or demur to the inquisition and proceed as in the King's Bench. (k)

Quo warranto.

(d) *In re Outlawry, Hindc, Clerk*, 1 Tyr. R. 347.

(e) *Per Hale, C. J.*, in Mod. 90; Bac. Ab. tit. Court of Exchequer, C.

(f) *Brown v. Welsh*, M. 5 & 6 Ph. & M. Rot. 37; *Jones, J. E. R. Mem. Outlawry*, and 2 Man. Ex. Pr. 624.

(g) *R. v. Bachanan*, 3 Tyrw. R. 229.

(h) *Com. Dig. Quo Warranto, A.*, *Sir Edmond Bacon's case*, Hardres, 129; 2 Man. Ex. Pr. 509; see *ante*, 367.

(i) *Co. Ent.* 535 b; 2 Man. Ex. Pr. 510.

(k) *Co. Ent.* 530 b; 2 Man. Ex. Pr. 510; *Sel. N. P. tit. Quo Warranto*.

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Prohibition.

As far as regards the jurisdiction over inferior Courts, it seems that a *prohibition* may be issued out of this Court to restrain an inferior Court from proceeding in a suit, or in a manner in which it has not jurisdiction; (l) and supposing a Court should proceed in a suit against a revenue officer, contrary to the summary order before alluded to, (m) probably the obtaining this writ would be one mode of preventing the other Court from proceeding, though the Court of Exchequer might proceed more summarily against the plaintiff in the action by attachment, for the contempt in disobeying the order of the barons.

Removal of civil
suits from in-
ferior Courts.

The books of practice state that this Court has jurisdiction to remove by *certiorari* civil suits commenced in inferior Courts of record into this Court, whether on the behalf of a plaintiff or of a defendant; (n) and we have seen that unquestionably a jurisdiction exists in favour of the crown, when its interests are involved, or an action brought against one of its officers for any thing done or omitted in that character, of prohibiting the plaintiff from proceeding otherwise than in this Court. (o)

Proceedings on
recognizances or
for fines, &c.

Recognizances, in whatever competent Court or jurisdiction they have been acknowledged, are always considered as *records*; and in respect of the actual or supposed due investigation and sanction given to them by the Court, judge, or other public officer before whom they are acknowledged, have more validity than in ordinary contracts not of record; and it has therefore been held, that a person of the age of sixteen is competent to enter into a recognizance conditioned to prosecute a criminal charge; and that if it be forfeited and estreated into this Court, it cannot be discharged unless a sufficient special ground for relief be made out; (p) but although the Court may, consistently with their general practice, be obliged to refuse to *discharge* a recognizance, yet they have power to *mitigate* the penalty. (q) Formerly, whenever a recognizance, of whatever description or wherever acknowledged, became forfeited, it was always estreated into and proceeded upon in the *Court of Exchequer*, as the proper revenue Court of the king, (r) and all applications for relief against the forfeiture after the estreat

(l) See the cases 2 Man. Ex. Pr. 505 to 507.

(m) Ante, 316, 317, 394.

(n) Skin. 244, 246; Tidd, 397, referring to Man. Ex. Pr. 152.

(o) Ante, 316, 317; Hard. 176; Parker, 143; 1 Anst. 205; 1 Price, 206; Man. Ex. Pr. 161, 164; Tidd, 397; Chitty's

Com. Law, vol. i. 805, 806.

(p) Ex parte Williams, M'Clel. Ex. R. 495.

(q) In the matter of Hooper, id. 378.

(r) Or rather into the office of the Lord Treasurer's Remembrancer of and in the Exchequer, see 2 Man. Ex. Pr. Append. 251, and note.

had taken place, were necessarily to this Court. (s) Afterwards, the 3 G. 4, c. 46, s. 6, and 4 G. 4, c. 37, transferred much of this jurisdiction to the respective Courts of Quarter Sessions, and which have power even to discharge the whole of the forfeited recognizance. (t) After this enactment, it was at first supposed that it did not determine or affect the jurisdiction of this Court, and that if a recognizance had in fact been estreated into this Court, it might here be discharged, mitigated, or compounded for as theretofore, according to the equity and circumstances of each case. (u) But it has been since doubted whether the Courts of Quarter Sessions can now in any case, since September, 1822, cause a forfeited recognizance, taken before them or justices of the peace, to be estreated into the Court of Exchequer; and it should seem that if improvidently the recognizance should be so estreated, the Court will not interfere. (x) Certainly since that act the Court of Exchequer has no jurisdiction over estreats of *recognizances not returned into it*, and the Courts of Quarter Sessions alone has jurisdiction to relieve against the forfeiture of recognizance within its jurisdiction. (y) But as regards *penalties, forfeitures*, and *finés*, as on jurors for non-attendance, or occurring during the *assizes*, application for relief may still be made to this Court. (z)

When a motion was to be made to discharge a forfeited recognizance estreated into this Court on an affidavit suggesting grounds for relief, the proper course was for the counsel to be furnished with a *constat* of the proceedings from the office of

(s) From the returns from the Court of Exchequer, extracted from the Report of the Select Committee on Finance, in 1798, it appears that the business of the office of the Lord Treasurer's Remembrancer of and in the Exchequer, was formerly very considerable, being the office principally concerned in what respected the *landed and casual* revenue of the crown. And in to that office, all *escheats of fines, issues, recognizances, amerciaments*, and other forfeitures, were, at the time of such return, viz. in 1798, regularly transmitted from both Houses of Parliament, from the Court of King's Bench and Common Pleas, and the Office of Pleas in the Exchequer, from the Justices of Assize, Justices of the Peace, Commissioners of Sewers, and from all other jurisdictions wherein they were set and imposed; and after these had been thus transmitted, the parties concerned have an opportunity of formally *traversing* the king's right. And at the commencement of each reign a writ of *privy seal* is issued *ex gratia*, allowing

the parties to apply in a summary way to the Court of Exchequer, to compound or discharge any fines, issues, amerciaments and recognizances, according to the circumstances of each case, and which is the source of the jurisdiction of this Court to hear motions on these subjects. 2 Mann. Ex. Pr. Append. 251 to 254.

(t) Per Lyndhurst, C. B., in *R. v. Thompson*, 3 Tyrw. R. 54; *R. v. Hawkins*, 1 M'Clel. & Y. 27.

(u) See 3 G. 4, c. 46, and 4 G. 4, c. 3; *Pellow's case*, 12 Price, 299, cited 1 M'Clel. & Y. 29, and other cases cited 1 Tyrw. R. Index, xlv. But see 1 M'Clel. & Y. 31, note (a).

(x) *R. v. Hawkins*, 1 M'Clel. & Y. 27.

(y) Per Lyndhurst, C. B., in *R. v. Thompson*, 3 Tyrw. R. 54; *R. v. Hawkins*, 1 M'Clel. & Y. 27.

(z) *Ex parte Sir T. Clarges*, 1 Young & J. 399; *Ex parte Ford and Ex parte Brown*, *id.* 401; *R. v. Hawkins*, 1 M'Clel. & Y. 27.

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the clerk of the estreats, in order that the Court might see what the recognizance was; and the motion should be made on one of those days in the week when the treasurer's remembrancer (now the king's remembrancer) is present in Court, and notice of motion should be given to him and to the solicitor of the treasurer; and if those proceedings have not been observed, the motion will be refused. (a) By 3 & 4 W. 4, c. 99, s. 41, the offices of the lord treasurer's remembrancer, as well as of the clerk of the estreats, were abolished; and by s. 45, the records of those offices were transferred to that of the king's remembrancer, and who, by s. 46, is to perform all the duties of the abrogated offices, subject to the orders of the barons. By s. 47, copies and extracts of all the records so transferred are declared to be as available in evidence as before the offices were abolished. (b) But s. 37 expressly retains the jurisdiction of the barons as to the said *fines, issues, amerciaments, penalties, forfeited recognizances and estreats*, or any process or proceeding thereon. (b) Where the amount of estreats to be certified by clerks of the peace, town clerks, &c. to this Court, is under 5*l.*, they may verify the return by affidavit, without commissions or personal appearance; (c) and in scire facias against the conusor of a recognizance to the crown, no costs are recoverable by the defendant, although he succeed on demurrer and in error. (d)

Newspaper recognizance.

The 1 W. 4, c. 73, requires every publisher of newspapers and pamphlets to execute a recognizance or bond with sureties, for securing the payment of fines upon conviction for libels and damages and costs, in actions for libels; and the third section gives the Court of Exchequer in particular, upon affidavit, summary power to direct proceedings upon such recognizance or bond. But in order to obtain the interference of this Court against a surety, it must be shown by positive affidavit that the plaintiff has used due diligence to obtain satisfaction from the goods of the principal obligor. (e)

Extents in chief or aid.

This Court, in connection with this revenue jurisdiction, has very extensive jurisdiction over writs of extent and in aid, and generally every description of proceeding connected with the revenue or debts to the king or his debtor; (f) thus it lies against the insolvent agent of a life insurance company, where

(a) *R. v. Holden and another*, 3 Tyrw. R. 580, and *Ex parte Dunk*, 2 Id. 500.

(b) *Ex parte Tomlins*, 2 Tyrw. 176,

(c) *Ibid.*; 3 G. 4, c. 46, s. 14.

(d) *R. v. Bingham*, 1 Tyrw. R. 262.

(e) *Pennell v. Thompson*, 1 Crompt. & Mees. 857; 3 Tyrw. R. 823.

(f) See the practice fully 11 *Id.*, 9 ed. 1013 to 1083; 11 G. 4, and 1 W. 4, c. 73; *R. v. Bingham*, 1 Crompt. & M. 862; see the older practice as to extents, West on Extents, and 2 Manning's Ex. Pr. 513 to 620; 1 Tyrw. R. Index tit. Extents.

it is found by inquisition that he had received a sum due to the crown for insurance duties, although the company also were liable to the crown. (g) But a crown debtor who has issued prerogative process against his own debtor, is not entitled to continue those proceedings after he has paid the debt due to the crown. (h) For a false return to an extent, by which return the crown, or the prosecutor, is prejudiced, an information may be filed in this Court, in the name of the attorney-general, whether the return be complained of as false in fact or insufficient in law; as where the sheriff to an extent had returned that the goods at the time he received the extent were in his hands under writs of fieri facias, *and that the said goods and chattels were then subject to such prior execution*, which was the part of the return objected to as insufficient in point of law. (i)

This Court has peculiar jurisdiction in enforcing the payment of *legacy duty*. The 42 G. 3, c. 99, s. 2, authorizes a rule of this Court, on the part of the Crown, calling on executors or administrators to shew cause why they should not deliver an account on oath of legacies and personal property paid or to be paid or administered by them, and why the legacy duties thereon should not be paid; and upon such rule nisi being served upon the executor and parties interested, they are to shew cause, and counsel for the crown argue in support of the rule; and if the Court shall be of opinion that the duty is payable, the order is made absolute, and if not obeyed an attachment issues. (l) But the rule for an attachment against an executor

Crown's recovery of legacy duties. (k)

(g) *R. v. Wragham*, 1 Tyrw. R. 383.

(h) *R.* (in aid of) *Hollis v. Bingham*, 1 Crompt. & M. 862.

(i) *R. v. Giles, Sheriff of Herts*, MS., and 2 Mann. Ex. Pr. 632, 633; and so held in *Giles v. Grover*, 9 Bing. 128; 2 Moore & S. 197, S. C.

(k) See also 55 G. 3, c. 184, *ante*, vol. i. 547; and see *In matter of Vian*, 1 Crompt. & J. 409, and *Re Pigott*, 1 Crompt.

& M. 827; and see the course of proceedings in *Re Cholmondeley*, 1 Crompt. & M. 149. In *Re Bruce*, 2 Tyrw. Rep. 475.

(l) 42 G. 3, c. 99, s. 2; *Re Bruce*, 2 Tyrw. Rep. 475; *Re Cholmondeley*, 3 Tyrw. Rep. 10, and other cases Chitty's Col. Stat. 1018, 1019, and *id.* Stamp Act, 2 Chitty's Rep. 456; 2 Young & Jerv. 290; 2 Mer. 45.

42 G. 3, c. 99, s. 2, enacts that in every case in which any executor or executors or administrator or administrators shall not have paid the duties granted and payable upon or in respect of any legacies, or any personal estate, or any share or shares of any personal estate of any persons dying intestate, by and in pursuance of an act passed in the thirty-sixth year of the reign of his present Majesty, or any other act or acts of Parliament relating to duties on legacies or shares of personal estates within proper and reasonable time, it shall be lawful for his Majesty's Court of Exchequer, upon application to be made for that purpose, on behalf of the commissioners appointed for managing the duties on stamped vellum, parchment or paper, on such affidavit or affidavits as to the said Court may appear to be sufficient, to grant a rule requiring such executor or executors, administrator or administrators to shew cause why he, she, or they should not deliver to the said commissioners an account upon oath of all the legacies or of the personal property respectively paid or to be paid or administered by him, or her, or them, as the case may be, and why the duties on any such legacies, or any shares or residue of any such personal estate have not been paid or should not be

Where executors, &c. shall not have paid the duties on legacies, under 36 G. 3, c. 52, (s. 6, &c.) the Court of Exchequer, on application from the Stamp Office, may grant a rule against such executors to deliver in an

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for not delivering an account at the legacy duty office is *nisi* only; (*m*) and the statute is not imperative in the Court, but gives them a discretionary jurisdiction; (*n*) and where a rule had been obtained against a surviving executor, it appearing that he had never acted except in signing some documents and had never received any assets, the rule against him was discharged. (*n*)

Taxes.

It has been held that the Court of Exchequer will not enter into any question of rateability to the assessed taxes. (*o*) But several subsequent decisions establish that questions upon assessments and rateability repeatedly are decided in this Court, as that if a person occupy part of a year he is liable to pay an entire year's taxes, (*p*) and when a shop, having no internal communication with the house, is rateable separately. (*q*)

A summary application may be sustained in this Court against the Commissioners of Land Tax to compel a *due* assessment of that tax, (*r*) and where the commissioners exceed the power given them by 43 G. 3, c. 161, s. 15, by discharging an assessment without a notice of appeal before them, the Court of Exchequer will order them to amend their schedule so as to cancel their discharge; (*s*) and relative to re-assessment of parishes and which are under the care and control of the Exchequer; (*t*) and the Commissioners of Taxes were ordered by the Court of Exchequer to state and sign a case for the appellants, for the opinion of a judge, where a question arose respecting certain increase of duty made by a surveyor on the appellants, (*u*) though probably a motion to the King's Bench for a mandamus would be a preferable proceeding. (*x*) Probably in all cases of taxes or matter of revenue, a parishioner or the sureties

account on oath forthwith paid according to law, and to make any such rule of Court absolute in every case in which the same may appear to the said Court to be proper and necessary for the better enforcing the payment of any of the said duties.

(*m*) *Re Vyryan*, 1 Tyrw. R. 379, and 1 Crompt. & J. 409, S. C.

(*n*) *Re Pigott*, deceased, 1 Crompt. & M. 827.

(*o*) *R. v. Navy Commissioners*, 3 Anstr. 858. For there is another remedy by appeal to the commissioners under 43 G. 3, c. 99, s. 24.

(*p*) *Price's Case*, 8 Price R. 122; *In re Colyton*, *id.* 117; *Sillett and Glass' Case*, *id.* 123; *Skinner's Case*, *id.* 124; *Wright's Case*, *id.* 125.

(*q*) *In re Reinhardt*, 8 Price, 106; *R. v. Dryden*, *id.* 103; *In re Cowell*, *id.* 105.

(*r*) *Attorney-General v. Commissioners of Land Tax*, 12 Price, 617; 1 Tyr. Rep. Indux, Revenue.

(*s*) *In re Colyton*, 8 Price, 117.

(*t*) 1 Tyr. Rep. Index, tit. Revenue; 7 Price, 594; 12 Price, 153; 5 Burn's Justice, tit. Taxes, 714.

(*u*) *In re Yarmouth Commissioners*, 9 Price R. 149; and see 43 G. 3, c. 99, s. 29, requiring such case if applied for. In case the opinion of a learned judge should be against the assessment, and the party assessed has paid it, the Tax Office may order the Receiver-General to repay such money. See 45 G. 3, c. 71, s. 3. By 4 G. 4, c. 11, copies of cases determined by the judges are to be annually laid before Parliament.

(*x*) *Ante*, vol. i 792 to 794.

of a collector might, by resorting to this Court, or perhaps to the Court of King's Bench, compel the collector more exactly to collect and make payment of the sums given him in charge to collect, or otherwise interpose when from the too frequent neglect to call upon him for a strict and exact discharge of his duty the parish or the sureties would be placed in peril. The protection of *parishes* from liability to re-assessment is a peculiar object of the care of the Court of Exchequer. (y) Parishioners and sureties for collectors would do well, to prevent the frequent losses occurring, to see that the conditions of the bonds executed be so qualified as to be imperative on the obligee to compel the collector very frequently to account and pay, or that the bond shall not be binding on the sureties, and also constantly to take care that such condition be complied with, and if not, to cause warrants to issue, and if refused, to apply to the Court of Exchequer or a baron for his fiat for an extent in aid; though the issuing of such warrant is not essential antecedent to such extent. (z) If, on the other hand, the acting Commissioners of Taxes should refuse, unless indemnified, to proceed to make a re-assessment on a parish to which the deficiency of a collector applies, this Court will order them to do so by rule to shew cause in the nature of a mandamus, and also order that a service on their clerk shall be deemed good service; nor is the crown limited to any time within which to make such an application. (a) It is in this Court that a party is to obtain his discharge from a crown debt, (such as an arrear of taxes,) and obtain his release from process when the debt has been paid by the crown debtor, upon motion by the attorney-general. (b)

In the acts relative to the *customs*, under the head of *munagement*, and the power to compel private individuals or corporate bodies to let buildings, the former act, 6 G. 4, c. 106, s. 43 & 45, entitles the Lord High Treasurer or the Commissioners of his Majesty's Treasury, or any person interested in but dissatisfied with the verdict of the jury impanelled, to try the amount of rent, &c. by appeal to the Court of Exchequer.

Unless where a particular statute gives jurisdiction to commissioners or justices of the peace, as in many cases under the laws of customs and excise, (d) this Court has *exclusive jurisdiction*.

Customs.

Exclusive by
information on
seizures. (c)

(y) *R. v. Bell*, 11 Price, 772, and other cases; 5 Burn's Justice, tit. Taxes, 26th edit. 713, 714, note (a).

(z) *B. v. Collenridge*, 3 Price, 280; 3 Burn's Justice, tit. Taxes, 26th edit. 714, in note.

(a) *In re Wootton*, 6 Price, 103.

(b) See the proceedings *Ex-parte Bennett*, 11 Price, 770.

(c) See in general 1 Tyr. Rep. Index, liii.

(d) 2 Burn's Justice, tit. Excise and Customs.

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diction; thus there cannot be an information upon a seizure to condemn goods by proclamation but in this Court of Exchequer, and the reason assigned is, because upon all such seizures every person concerned may have and know a certain place to resort unto for his remedy in this kind. (e) The Court will not compel the attorney-general to state particulars of the charges meant to be relied upon in an information by him or other officer of the crown, or any measure of a similar nature, although the charges cover a space of thirty years, &c. (f)

In case of a seizure of goods under the laws of custom or excise, *fourteen* days are allowed for entering claims, but even after that time, upon an affidavit of merits, the Court will set aside the condemnation and admit the investigation of the claim, (g) but then it seems that the costs of the condemnation and of the application must be paid. (h)

By 6 G. 4, c. 108, s. 73, all penalties and forfeitures incurred or imposed by any act relating to revenue of customs may be recovered by action of debt or information in *any Court of Record* at Westminster, in the name of the attorney-general, or of an officer of customs, or before two justices; by 7 & 8 G. 4, c. 53, s. 37, all excise penalties, &c. in *Exchequer*; and by 56 G. 3, c. 104, s. 15, in name of attorney-general or by order of commissioner.

Petitions of right, &c. between king and subject.

The Court of Exchequer appears to be the proper tribunal for the trial of petitions of right, or bill of manifestation of right, or a traverse of office. (i) Where a judgment for the crown has been reversed, the effect of the judgment in favour of the plaintiff in error is, that he be restored to all the property claimed, and so of rents received by the sheriff and not paid over. (k) But money that has once reached the king's hands can it seems be recovered only by petition, (l) and it is said that a crown lease once extended cannot be restored, because by the judgment and extent the lease has become vested in the crown as the lessor, and thereby merged and extinct. (m)

Crown practice in the Exchequer.

A defendant who has been arrested on a revenue information filed against him, and has entered into a recognizance

(e) Per Parker, Ch. B., Parker's Rep. 69; and see Com. Dig. Courts, D. 2.

(f) *Attorney-General v. Lambeth*, 5 Price, 386.

(g) *In re Ship Louisa Margareta*, 1 Price, 48.

(h) *Attorney-General v. Cullen*, 8 Price, 668.

(i) 2 Man. Exch. Pr. 578 to 584; 4 Coke, 57, 58; Godbolt, 300, pl. 417.

(k) 2 Man. Exch. Pr. 624.

(l) Per Westbury in *Sir John Rigley's Case*, Tr. 7 H. 6, fo. 44, pl. 22.

(m) Moore, 237; but see *Lillingstone's Case*, 7 Coke, 37.

of bail to appear and answer, cannot move to discharge such recognizance on the ground of the attorney-general not having proceeded to trial according to notice, till after three clear terms exclusively have elapsed, nor after issue joined, but after the time for which notice of trial had been given; thus a defendant arrested in Michaelmas term having given bail in Hilary term and received notice of trial for the subsequent sittings, cannot move until after Michaelmas term. (*n*) A defendant may plead in person to an information by the crown in the Exchequer. (*o*)

This Court has no immediate jurisdiction in relation to crimes, nor has this Court any crown side like the King's Bench. (*p*) But where a defendant in one action is under imprisonment upon a sentence for a libel or other criminal matter or process of a criminal court, the bail may in this Court obtain time for rendering him till a week after the imprisonment under the sentence shall have expired. (*q*) So a prisoner in the criminal custody of the marshal of King's Bench may be brought up by habeas corpus under 2 W. 4, c. 39, s. 8, in order to charge and detain him with a declaration in this Court. (*r*) And where a party is in custody of the sheriff of a distant county under an attachment issuing out of the Exchequer, and a bill of indictment has been found against him in Middlesex, for perjury committed in that county, the proper course seems to be for the prosecutor to move this Court for an habeas corpus directed to the sheriff of the distant county, and requiring him to have the prisoner at the next General Sessions of Oyer and Terminer of Middlesex, giving notice of the motion to the prisoner and to the gaoler of such distant county. (*s*)

No jurisdiction over criminal matters, excepting collaterally.

The equity jurisdiction of the Court of Exchequer will presently be considered amongst the Courts of Equitable Jurisdiction.

Of Courts of Equity in general. (t)

We have attempted to explain the distinctions between legal and equitable rights, injuries and remedies; (*u*) and shewn that the Legislature and the Courts consider it of essential importance to keep those distinctions inviolate, not only as they

Of Courts of Equity.

(*n*) *Attorney-General v. Bear*, 6 Price, 89.

(*o*) *Attorney-General v. Carpenter*, 1 Tyr. 351.

(*p*) 5 Taunt. 503; Tidd, 478.

(*q*) *Campbell v. Ackland*, 3 Tyrw. R. 230.

(*r*) *Ess v. Smith*, 3 Tyrw. 363.

(*s*) *In re Wellon*, 1 Tyrw. R. 385.

(*t*) As to the jurisdiction of chancery in general, see Chit. Eq. Dig. tit. Jurisdiction, 584 to 603.

(*u*) *Ante*, vol. i. 6, 7, 8, 333, 334, 354, 365 to 373.

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affect *claims*, but also as regards *defences*, for reasons that have been explained. (v) The principal distinction between Courts of Law and Courts of Equity as respects *jurisdiction* is, that the former have exclusive cognizance over *legal* rights and *legal* defences, whilst Courts of Equity have peculiar cognizance of *equitable* rights and defences. But there are many other grounds for resorting to a Court of Equity, as for a *discovery* of facts. Another principal distinction between Courts of Law and Equity is, that the former, in personal and mixed actions, usually award *damages* as a compensation for the injury; whereas a Court of Equity (except in a few instances) never decrees *damages* (x) or *compensation* singly, without other relief, and the granting compensation to purchasers is only a peculiar exception, incidental and ancillary to that jurisdiction which the Court possesses in giving relief by enforcing a specific performance of contracts in matters of *freehold*; (y) and although on a bill filed, a Court of Equity will set aside a fraudulent release, yet that Court will not decree *payment* of the debt released, but leave the claimant to recover the same at law after getting rid of the effect of the release. (z) However, on a bill for the arrears of an annuity charged on land, a Court of Equity has jurisdiction to decree that the amount shall be *raised* by the sale or mortgage of the estate; (a) and it is said that the Court of Chancery has jurisdiction over a demand for a sum certain in favour of the *officers* of that Court; (b) and a bill may be filed against an *executor* to discover assets, and for equal distribution amongst creditors or legatees. Equity may also give relief by decreeing payment of the debts out of those assets. (c) So where a negociable instrument, as a bill or note, has been lost, after tendering an indemnity, a bill may be filed praying a decree of *payment*. (d) Another distinction is, that Courts of Equity are not rigidly bound by rules not prescribed by statute, as Common Law Courts are. (e)

We have alluded to the several invasions by Courts of Law and Equity reciprocally upon each other's jurisdiction, and seen that in some respects (as in the instance of a *lost* deed and

(v) *Ante*, vol. i. 7; and see observations of Lord Kenyon in *Goodtitle v. Jones*, 7 T. R. 50; *Bauerman v. Radenius*, 7 T. R. 667; and *Mathews v. Lewis*, 1 Austr. R. 7.

(x) *Bovey v. Tracy*, 2 Eq. Abr. 163; *Clinan v. Cooke*, 1 Scho. & Lef. 25.

(y) *Newham v. May*, 13 Price, 749; 1 M'Clel. 511, 515, S. C.; Chit. Eq. Dig. tit. Compensation, 221; and *Id.* tit. Jurisdiction of Chancery, 585; and see in-

stances of compensation to purchasers, *ante*, vol. i. 842 to 844, 865 to 868.

(z) *Pascoe v. Pascoe*, 2 Cox, 109.

(a) *Cupit v. Jackson*, 13 Price, 721; 1 M'Clel. 495, S. C.

(b) *Barker v. Dacre*, 6 Ves. 681.

(c) *Heath v. Percival*, 1 Stra. 405.

(d) *Glyn v. Bank of England*, 2 Ves. sen. 327; *Mossop v. Eadon*, 16 Ves. 430.

(e) *Martin v. Marshall*, Hobart's R. 63.

matters of account) Courts of Law and Equity have *concurrent jurisdiction in some few respects* as regards the *right* and the *defence*, though the form of the *remedy* materially varies. We will now examine, with more particularity, the jurisdiction of Courts of Equity, which are divided into those of the Chancellor and his Court of Chancery, exercised by himself or the Vice-Chancellor; and the Court of the Master of the Rolls, and the Equity Side of the Court of Exchequer; and, *first*, of the jurisdiction of the Chancellor and the Court of Chancery.

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SECT. VI.—Of the Jurisdiction of the Chancellor and Court of Chancery.

First. The Common Law Jurisdiction of the Chancellor.

Secondly. The Equitable Jurisdiction of the Court of Chancery is principally in Cases of—

1. Accidents and Mistakes.
2. Accounts.
3. Frauds, various, and Means of preventing Frauds or relieving against the same.
4. Infants.
5. Specific Performance.
6. Trustees, Executors and Legacies.

Thirdly. The Statutory Jurisdiction of the Chancellor.

Fourthly. The specially delegated Jurisdiction, as over Idiots and Lunatics.

The Principal Peculiarities in the Jurisdiction of Chancery.

Course of Proceedings in Chancery is Formal or Summary.

Annuity Deeds.

Arbitrations and Awards.

Against Solicitors.

When the Court of Chancery has no Jurisdiction.

No Criminal Jurisdiction.

Not over Marriage or Alimony and Exceptions.

When over Wills.

Not if Remedy or Defence at Law.

Unless Jurisdiction concurrent.

Not when Matter *infra dignitatem*.

A Summary of the Jurisdiction of Courts of Equity.

The Chancellor how relieved from Pressure of Business.

The jurisdiction of the Chancellor and Court of Chancery, whether vested in him individually *virtute officii*, or as the judge presiding in the Court of Chancery, are very extensive. In matters relating to *private rights* (the principal objects of our present inquiry) the jurisdiction has been usually arranged under *four* principal heads, viz. *First*, the Chancellor's *common law* jurisdiction; *Secondly*, his *equitable* jurisdiction, or rather the jurisdiction of the Court itself over which he presides; *Thirdly*, his statutory jurisdiction; and *Fourthly*, his specially delegated jurisdiction; (*f*) and it may be convenient to follow that order as corresponding with the Treatises and Digests, though the subjects are certainly capable of a better and more

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I. The Court of CHANCERY and the CHANCELLOR'S JURISDICTION, either original or by statute. (*f*)

(*f*) As to the jurisdiction of Chancery in general see Chit. Eq. Dig. 584; Com. Dig. Chancery, 603; Mad. Ch. Pr. 1; Chit. Eq. Dig. tit. Jurisdiction of Chancery, 3 Bla. C. 47, 428, note 1; S. Smith's Chancery Prac. 3. The 53 G. 3, c. 24,

s. 2, appears to recognize these several objects of jurisdiction. The Court of Chancery, so far as concerns its *common law* jurisdiction, is a Court of record, though not so as to its *equitable* jurisdiction, 2 Mad. Ch. Pr. 712.

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Law jurisdiction
of Chancellor.

systematic arrangement, which we will, for the use of students, presently suggest.

First, With respect to the *Common Law* Jurisdiction of the Chancellor, it principally relates to litigation between private parties by *action* in the *Petty Bag Office*; a Court, or rather office, in which all personal actions by or against any officer or minister of the Court of Chancery may and ought in strictness to be brought in respect of his service or attendance in that Court. (g) In this Court also the Chancellor has jurisdiction to hold plea of *scire facias* to repeal the king's letters *patent*, (h) traverses of offices, *scire facias* on recognizances, (i) executions upon statutes, &c. If a *demurrer* be joined upon the pleadings in this Court, the Chancellor may give judgment, (j) but if an issue of *fact* be joined, the record must be delivered to the Court of King's Bench and *there* tried, and a motion for a new trial should be there made and judgment given. (k) And after verdict in an action in the Petty Bag Office, an application to discharge the defendant for not having been charged in execution within two terms, must be made to the King's Bench, though the Court of Chancery, to remove any difficulty, will make a collateral order to the same effect imperative on the plaintiff. (l) It is said that the Court of Chancery will not allow writs of error in the King's Bench upon judgments in the Petty Bag. (m)

The issuing of writs of *Supplicavit*, particularly on behalf of married women and against peers, to obtain sureties to keep the peace, is a useful branch of the common law jurisdiction of the Chancellor. (n) A writ of Habeas Corpus, returnable before the Chancellor, especially in vacation, when the judges may be on the circuit, is an important jurisdiction, fully established after great consideration; (o) and thereby at all times relief can be *instantly* obtained from unjust imprisonment. (o) Writs of *Certiorari* and *Prohibition* may also be issued by the Chancellor, returnable before himself or the Vice-Chancellor, but the latter will be issued only in vacation. (p)

The Chancellor has jurisdiction at all times to issue a writ of

(g) 1 Mad. Ch. Pr. 4.

(h) *Prince's case*, 8 Coke, 4; 4 Inst. 79.

(i) *Grant v. Stone*, 1 Vern. 213; 1 Mad. 4.

(j) *King v. Knox*, Coop. 98.

(k) 1 Mad. 4.

(l) *Fraser v. Lloyd*, 19 Ves. 317; Coop. 187, S. C.

(m) *Res v. Cary*, 1 Vern. 131.

(n) *Ante*, vol. i. 683; 3 Ves. & B. 183; 1 Jac. & W. 348; 1 Mad. 11.

(o) *Ex parte Crowley*, 1 Swanst. 1; Buck, 264, S. C.; 1 Mad. Ch. Pr. 21;

ante, vol. i. 694.

(p) *Donegal v. Donegal*, 3 Phil. R. 597.

The Court of Chancery will not entertain a motion for a *prohibition* in term time, *Montgomery v. Blair*, 2 Schol. & Lef. 136. But as that Court is open in vacation, then when an inferior Court is pressing on improperly in a suit over which it has not jurisdiction, the application for the *prohibition* should be made in Chancery, 7 Ves. 257; Com. Dig. Chancery, Appendix, *Prohibition*.

prohibition to all inferior Courts, whether temporal or ecclesiastical, as to the Consistory Court of London, in case it should improperly assume jurisdiction; (q) and he may delegate to the Vice-Chancellor the hearing and deciding upon the propriety of issuing a writ of prohibition. (q) Yet in practice the Court of Chancery will not interfere in term time but only in vacation, because in term time application may be more properly made to the superior Courts of law for such prohibition. (r) It will be observed that a *prohibition* is directed to the Court wrongfully assuming jurisdiction, but an injunction only operates *in personam* and forbids the party to proceed in the inferior Court, at the risk of an attachment, should he be guilty of a contempt by proceeding. The Chancellor also, *virtuti officii*, has jurisdiction to issue various original writs and writs of error to other Courts, authorizing or commanding them to act, as amongst others the writ *de ventre inspiciendo* on behalf of an heir, &c. (s)

It has been said that this common law jurisdiction of the Chancellor is nearly obsolete, (t) but in many cases, especially in vacation, it may be exercised with great utility. And all the four branches of jurisdiction are expressly recognized and may be delegated, when the Chancellor thinks fit, to the Vice-Chancellor by the 53 G. 3, c. 24, s. 2, which speaks of the common law jurisdiction of the Chancellor, and also of that delegated to him by statutes as well as his equity jurisdiction. The Chancellor, *virtuti officii*, has power to remove *coroners* when guilty of misbehaviour. (u) But although he has jurisdiction over justices of the peace in their *appointment*, (x) afterwards, if a justice be guilty of misconduct, the only proceeding is by criminal information in the King's Bench, and after conviction he may be removed from the commission. (x)

Secondly, and principally, is the *Equity Jurisdiction* of the Chancellor and Court of Chancery, and which, although not a Court of record as regards its *equitable* jurisdiction, is the most extensive and useful in the realm. (y) The jurisdiction of

Secondly. The Equitable Jurisdiction in Chancery.

(q) *Donegal v. Donegal*, 3 Phil. 597.

(r) Com. Dig. Appendix to Chancery, tit. *Prohibition*, ante, 355, 388, 396.

(s) 1 Mad. Ch. Pr. 5 to 23.

(t) 1 Woodes. V. L. 125; 1 Mad. 5.

(u) *Ex parte Winwill Freeholders*, 3 Atk. 184; Chit. Eq. Dig. *Coroners*. See further Burn, J. tit. *Coroner*, iv. A coroner removed may have a commission to inquire whether the cause for removal be true, but he cannot traverse it, 1 Jac. & W. 454.

(x) *Ex parte Roch*, 2 Atk. 2; 2 Mad.

Ch. Pr. 720, 721; *Rex v. Constable*, 7 Dowl. & R. 663. The appointment is by letters patent under 27 H. 8, c. 24, s. 2; and see *Jones v. Williams*, 5 B. & C. 762. As to determining his authority, Burn's Justice, tit. Justice, ii.

(y) Com. Dig. Chancery, C. 2. It seems that the Court of Chancery, so far as concerns its common law jurisdiction, is a Court of record, and therefore it has been suggested that a submission to arbitration may be made a rule of this Court under 9 & 10 W. 3, c. 15. 2 Mad. Ch. Pr. 712.

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this Court is entirely *civil*, and, excepting in a few instances presently noticed, neither the Chancellor nor the Court of Chancery exercises any *criminal* jurisdiction even for the *prevention* of crime.

As regards *private rights* and remedies, the subjects of equitable jurisdiction and relief have been arranged by Mr. Maddocks, in his excellent treatise on the Principles and Practice of the Court of Chancery, and by others, under six principal heads, as 1. Accident and Mistake; 2. Account; 3. Fraud; 4. Infants; 5. Specific Performance of Agreements; 6. Trusts; (z) and though it is obvious that system has not been much regarded in that arrangement, yet as it has become familiar, we will adopt it, and afterwards add a few suggestions for a preferable arrangement.

1. Accidents
and Mistakes.
(u)

In cases of *accident*, this Court always afforded relief, as in cases of *lost deeds*; and anciently it was supposed, that if a bond were lost, so that no profert could be made on the declaration, (b) there was no remedy but to tender an indemnity, and file a bill in equity to compel payment; (c) but in progress of time, although (as the expression has been) the Chancellors *much grumbled* at the assumption, Courts of Law dispensed with the profert of any *deed*, and thereby obtained a *concurrent* jurisdiction; (d) and which also extends to the loss of a commission of bankruptcy, or any other document *not negotiable*, and in which cases, after proof of the loss, parol evidence of the contents is admissible in a Court of Law. (e) But although a Court of Law may have concurrent jurisdiction, yet if the terms of the lost deed be not certain, and the obligor knows them, then a bill partly for a discovery, and partly for relief, may be preferable, always first tendering an indemnity. However, in the case of a *negotiable instrument*, as a bill of exchange or promissory note, which possibly may have been received *bonâ fide* by a new party after the loss, so as to expose the acceptor or indorser to the possibility of another claim, or at least of litigation, a Court of Equity still

(s) 1 Madd. Chan. Pr. 23 to 26; vol. ii. 164.

(u) See cases collected 1 Chit. Eq. Dig. 197, 311; 1 Madd. Chan. Pr. 24.

(b) 1 Chan. Cases, 77.

(c) *Snellgrove v. Bailey*, 3 Atk. 214; *Walmsley v. Child*, 1 Ves. 341; *Toulmin v. Price*, 5 Ves. 235; *Ex parte Greenaway*, 6 Ves. 812; *Bromley v. Holland*, 7 Ves. 19; 3 Ves. & B. 54.

(d) *Read v. Brookman*, 3 T. R. 151;

2 Madd. Chan. Pr. 170; Com. Dig. Chancery, C. 2, and Z.; id. vol. 8, Appendix, Chancery, xvii. xviii. Equity will relieve even against a surety, and although the principal be out of the kingdom, 3 Atk. 93; 1 Chan. Cas. 77; 9 Ves. 464; but no relief will be afforded in equity if the bond were voluntary and without consideration, 1 Chan. Cas. 77.

(e) *Polly v. Millard*, Exchequer, 9 Law Journal, 114.

retains the sole and exclusive jurisdiction, on indemnity tendered and bill filed, to compel payment: (f) one principal reason is, that a Court of Equity, by referring the sufficiency of the security to one of its masters, can better provide for future risks than a Court of Law. (g)

So although we have seen that in some cases *mistakes*, or at least *ambiguities*, may be explained and remedied at law, yet in general it is advisable for the party desirous to rectify it to file a bill in equity. (i) Thus we have seen, that if a promissory note, in which a surety has joined, has by mistake been drawn only as a joint note, although it was intended to be joint *and several*, on a bill filed, a decree that a proper note shall be delivered may be obtained even against a surety. (k) And if an obligor be sued at law upon a bond framed as a money bond absolutely for the payment of money, and insists that it was intended merely as an indemnity bond, and that the obligee has not been damnified, he cannot plead such matter as a defence at law, but must file a bill: (l) and in general, in case of a mistake in a deed, recourse to a suit in equity is advisable, (m) where not only mistakes in the deed itself may be rectified, but the execution of a proper deed compelled, (n) and even the consequences of an omission to enrol a bargain and sale within six months may be avoided, by compelling a vendor to execute another similar deed, in order that the latter

Mistakes. (h)

(f) *Ante*, 408, n. (c); *Hansard v. Robinson*, 7 B. & C. 90; *Ryan & M.* 90; *Davies v. Dodd*, 4 Taunt. 602; see prayer of bill in *Glyn v. Bank of England*, 2 Ves. sen. 327; *Mossop v. Eadon*, 16 Ves. 430.

(g) But yet it will be observed, that the Court of King's Bench frequently refers the sufficiency of security, as security for costs, to the master of that Court and the Courts of C. P. and Exc. the same, and therefore that reason seems to fail. Where a bond, deed, bill of exchange, or note has been lost or destroyed, then, after a verbal request to pay and offer of indemnity, and refusal of payment, a *draft* of a joint and several bond, with two or more well-known responsible persons as sureties, and conditioned for fully indemnifying the debtor, in the event of any third person's claim, against the payment of the principal sum, as well as the interest, costs and expenses, should be prepared, tendered, and left with the debtor, with a request that he will cause the same to be returned for engrossment, approved or altered before a named day, and accompanied with an offer to pay any reasonable expenses he may thereby incur; and a notice that a bill in equity

will be filed in case he should refuse to pay on such indemnity; and in case he neglects to return the draft or refuses to accept the indemnity or pay, there is no necessity for tendering a bond engrossed on stamp. The same observation applies to the tender of a mortgage or other security. In case of continued refusal to pay, then a full affidavit of the contents of the lost instrument, and the circumstances of the loss, should be made, and the bill prepared and filed. 2 Ves. 89; *Renison v. Ashley*, 2 Ves. jun. 461; *Walmsley v. Child*, 1 Ves. 341; 1 Vern. 59, 180, 247, 310; 1 Chan. Cas. 11, 231; Mitf. Pl. 3d ed. 43, 100; 1 Madd. Chan. Pr. 26. But if equitable relief only is sought, then an affidavit seems unnecessary, Mitf. Pl. 100.

(h) See in general 1 Madd. Chan. Pr. 24, 47 to 85; Chit. Eq. Dig. tit. Mistake, 682.

(i) *Ante*, vol. i. 123, 394, 711, 833 to 844; and Chit. Eq. Dig. tit. Mistake.

(k) *Rawstone v. Parr*, 3 Rus. R. 424, 529; *ante*, vol. i. 710, 711.

(l) Cowp. R.

(m) See instances 3 Bla. Com. by Chit. 426 b, in notes.

(n) *Ante*, vol. i. 710, 711.

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may be enrolled in due time after its execution.(o) In these cases the *draft* of an *amended* deed should be left with the party a reasonable time, and the like conduct observed as in the case of a lost instrument before any bill be filed.

2. *Accounts.*(p)

2dly. Matters of *accounts* of various descriptions, as between mortgagor and mortgagee,(q) principal and agent,(r) partner and partner,(s) and matters relating to *tithes* and various other matters of *account*, over which, as they are frequently complex and not readily ascertainable before a jury, and are better investigated in a master's office, this Court always exercised at least concurrent jurisdiction, provided the *account remains open*; that is, where there has not been a balance agreed.(t) Indeed in one case a learned judge supposed that he might refuse to try a case of complex account in an action

(o) 6 Ves. 745.

(p) See in general 1 Madd. Chan. Pr. 85 to 109; Chit. Eq. Dig. tit. Account, 2 to 22.

(q) Now, as we have seen, provided for to a limited extent even at law, *ante*, vol. i. 868.

(r) *Ante*, vol. i. 868.

(s) *Id.*; 1 Madd. Chan. Pr. 87, to 93; and see Chit. jun. on Contracts, 2d ed. 191 to 193, where a partner may sue at law, or must proceed in equity.

(t) *Ante*, vol. i. 868, 869; Com. Dig. Chancery. C. 2, A. 2. The equitable jurisdiction over matters of account arose from the writ of account at law not affording so complete a remedy, *Carlisle v. Wilson*, 13 Ves. 276. Mutual demands and the existence of several items to be examined into, are in general essential to sustain a bill for an account; and the cases of *Stewards* and of *Dower* are exceptions standing upon their own peculiarities, *Dinwiddie v. Bailey*, 6 Ves. 88 to 90, 141; and it is only complicated accounts, which, though cognizable at law, are likewise cognizable in equity, 1 Scho. & Lef. 309. A bill for an account must therefore allege that there still are numerous items subsisting, and not that they have been; for otherwise there is no reason why the complainant should not proceed at law, *Frielas v. Don Santos*, 1 Young & J. 574. In general, if a written account has been stated (though not signed) and agreed, or even retained a considerable time by the party to whom it was sent without his objecting, (from which such agreement may be inferred, but see *Clancarty v. Latouche*, 1 Ball & B. 428; and Chit. Eq. Dig. tit. Acquiescence,) the remedy is only at law, and a bill for an account

and to compel payment, cannot in such a case, unless fraud can be shewn, be sustained; because the requiring an account, which has already been agreed, is useless, and whenever the debt is fixed as by agreement, the proper remedy is at law as much as where there is a bond or covenant to pay a sum certain, 1 Madd. Chan. Pr. 100 to 103; *Hirst v. Peirse*, 4 Price, 339; Com. Dig. Appen. Chancery, tit. Account. Before filing a bill, it will obviously be proper and essential, as respects the costs, to make a civil application for the account, and to wait a reasonable time afterwards. See the reason, *ante*, vol. i. 436, 439, 498, 509, 532; *Weymouth v. Boyer*, 1 Ves. jun. 423. If the account is simple, and the evidence readily examinable in the course of a few hours, then the preferable course is to proceed by action, as against a factor, or any other agent, with the security of bail; but when the items are numerous, and could not well be investigated in a day, it is advisable at once to refer to arbitration or file a bill in equity; and in the latter case a *ne exeat* may be obtained if the agent be about to proceed abroad, *ante*, vol. i. 732; when not, *Dick v. Swinton*, 1 Ves. & B. 371. The plaintiff usually pays costs, where an account turns out against him, or where he prevails in nothing but what he might have insisted upon at law; but though costs usually follow the event of the account, still if it was intricate or doubtful, no costs will be given; and where money was found due to the defendant upon the account, but much less than had been claimed by the defendant's answer, he was not allowed his costs, 2 Madd. Chan. Pr. 557; *Collyer v. Dudley*, 1 Tur. & R. 421; *ante*, vol. i. 868, 9.

at law, though that notion was erroneous,(u) yet in matters of account between partners, it is clear that the only remedy is in equity for a balance, unless it has been agreed to as well as struck,(v) or there has been a covenant to account or pay.(x)

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3dly. *Frauds* of every description, whether in the creation 3. *Frauds.*(y) of *contracts* or obtaining *deeds* or other instruments, or in any other transaction, and whether committed by trustees or attornies, or other agents or party, and whether affecting heirs or wards or other parties, are the most fertile sources of litigation in the Court of Chancery, and a bill may be filed praying that the deed or other instrument may be delivered up to be cancelled or for other relief;(z) and amongst these may be included all *catching bargains*, against some of which, however, when the contract is not under seal, a jury, by giving only nominal damages for the breach of the unfair bargain, can in effect afford relief at law.(a) So where a deed has been *unfairly* obtained from an imbecile old man, a Court of Equity may decree it to be cancelled, although the circumstances do not establish a case strictly of fraud.(b) But fraud in obtaining a *will* of *real* property is cognizable only at law, and must always be sent out of a Court of Equity to be tried at law by a jury.(c)

As observed by Mr. Justice Ashhurst, *fraud* in obtaining a contract even under seal, when established in evidence, vitiates it as much at law as in equity, and may be pleaded in bar to an action on such deed.(d) *But by filing a bill in equity charging the fraud, and praying that the instrument may be delivered up, the obligor not only compels the obligee to state the truth at the risk of an indictment for perjury, but also, if he succeed in establishing the fraud, may have the securities delivered up and cancelled, so that he will be no longer in

(u) *Scott v. Mackintosh*, 2 Campb. 238; *King v. Rossett*, 2 Young & J. 83; *ante*, vol. i. 22.

(v) 2 T. R. 478; 2 B. & P. 124; 4 Moore, 340; Chit. jun. on Contracts, 191 to 193.

(x) *Ibid.*; 7 Mod. 116; 13 East, 8, 538.

(y) See in general 1 Madd. Chan. Pr. 109 to 331; Chit. Eq. Dig. tit. Fraud, 455 to 474.

(z) *Ibid.*; Com. Dig. Chancery, 3, M.; *id.* vol. 8, Appnd. Chancery, xvi.; 3 Bla. Com. by Chit. 426 d, in notes; *ante*, vol. i. 766, 779, 786, 833. As to the frequent injunction bills to prevent the negotiation of bills of exchange and pro-

missory notes, see *ante*, vol. i. 706; and to deliver up deeds, *id.* 709.

(a) *Ante*, vol. i. 112 n. (h); 458, n. (m); 826, 838; 3 Ves. & B. 117.

(b) *Blackford v. Diarmed*, Knapp's R. 73; *Diarmed v. Diarmed*, 3 Wil. & Shaw, 37, S. P.

(c) 3 Bla. Com. 431.

(d) *Cockshott v. Bennett*, 2 T. R. 763; 3 T. R. 48. That it must be pleaded, see *Edwards v. Brown*, 1 Tyr. R. 196. But it may be pleaded generally, without shewing the circumstances of fraud, because they are as much in the knowledge of the obligee as the obligor, 2 M. & S. 378; 9 Coke, 110.

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peril of being sued at any distance of time, when the witnesses to prove the fraud may be dead, and, if the deed constituted a charge upon his property, the incumbrance or impediment will by the decree be completely removed. (e) But where both parties have acted fraudulently, as where deeds have been executed in order to create a colourable qualification under the game laws, or a vote at an election, or to induce a parent to consent to a marriage, a Court of Equity will not interfere. (f)

Under this head, of *fraud* and *prevention of frauds*, have been usually included, though obviously without regard to arrangement, several heads somewhat foreign or remote from the direct subject of fraud, as 1. Purchases by trustees and attornies or solicitors or others, in fiduciary situations, of the trust property; 2. Transactions between attorney and client; 3. Sales or agreements by expectant heirs, and gifts by a ward to his guardian; 5. *Injunctions* (a most comprehensive title); 6. Bills of peace; 7. Bills of interpleader; 8. Bills of certiorari; 9. Bills to perpetuate testimony; 10. Bills of discovery, (and here might also be included bills to produce deeds); (g) 11. Bills quia timet; 12. Bills for delivery up of deeds, or for securing them, or the delivery up of specific chattels; (h) 13. Bills for apportionment, or to enforce contribution; 14. Bills in cases of dower and partition; 15. Bills to establish a modus; and 16. Bills to marshal securities. (i)

As regards many of these, especially *injunctions*, we have already fully considered them amongst the remedies to prevent *injuries*, (k) and stated the principle on which injunction bills are sustained, as well as the practice in obtaining them, (k) as they protect the person, or personal or real property. Thus as respects principally *personal* property, *injunctions* against partners to prevent ruinous conduct affecting the joint trade, (l) or against agents or attornies to prevent disclosure of confidential communications, (m) to prevent the negociation of bills of exchange, notes, &c. (n) to compel the delivering up and cancelling of deeds, and other instruments, (o) to prevent the breach of contract by some wrongful act, (p) to prevent other

(e) *Ante*, vol. i. 709, 710; Newland on Contracts. And see distinction between legal and equitable jurisdiction in cases of fraud, *Fullager v. Clark*, 18 Ves. 438.

(f) 2 Jac. & W. 391.

(g) *Smith's Chan. Pr.* 362, 363, 313, 516.

(h) *Ante*, vol. i. 812 to 815; and *id.* 112.

(i) 1 Madd. Chan. Pr. 110 to 331; and see some of those heads Chit. Eq. Dig. tit. Fraud.

(k) *Ante*, vol. i. 695 to 736.

(l) *Ante*, vol. i. 704.

(m) *Ibid.* 705.

(n) *Ibid.* 706.

(o) *Ibid.* 709.

(p) *Ibid.* 711.

breach of confidence in divulging secrets in trade; (q) to prevent injurious payments, sales or conveyances, (r) or other loss; (s) to prevent preference, misapplication, or devastavit by an executor or administrator; (t) to prevent the sailing of ships by the minority of ship-owners; (u) to prevent the infringement of copyrights, patent rights, or inventions, (x) or other imitations. (y) So as respects *real property* we have considered bills to preserve boundaries; (z) bills to prevent destructive wasteful trespasses, (a) or disturbances of franchises; (b) to prevent the ill performance of lawful works; (c) bills of peace to quiet possession and prevent successive vexatious litigation; (d) to prevent waste, (e) or private (f) or public (g) nuisances.

With respect to bills of interpleader, we will presently notice them particularly. (h) Bills to perpetuate testimony have already been considered, (i) as well as writs of *ne exeat*, (k) and some other modes of preventing loss or injury. (l)

A bill in equity also lies to set aside letters patent obtained by *fraud* or *misrepresentation*; (m) though scire facias returnable and tried in the Court of King's Bench is the more common proceeding: and the right to the patent may be tried by infringing it and then defending an action for the piracy. And such is the extensive jurisdiction of Chancery to relieve against fraud, that although in general a fine or recovery formally levied or suffered is conclusive, yet if a fine be obtained by fraud, equity will avoid its effect by decreeing the parties to reconvey, and thereby vacate such fine. (n) And a Court of Equity may relieve against a deed or instrument where it has been *unfairly obtained*, although there may not have been such a degree of *fraud* as to invalidate the instrument at *law*, (o) and not only the party immediately affected by fraud, but also

(q) *Ante*, 714.
 (r) *Ibid.* 715.
 (s) *Ibid.*
 (t) *Ibid.* 545, 551, 716; *Sharples v. Sharples*, M'Clel. R. 506.
 (u) *Ante*, vol. i. 717.
 (z) *Ibid.* 718.
 (y) *Ibid.* 721; *Marzetti v. Williams*, 1 B. & Adol. 425.
 (x) *Ante*, vol. i. 722.
 (a) *Ibid.* 722.
 (b) *Ibid.* 724.
 (c) *Ibid.* 725.
 (d) *Ibid.* 726.
 (e) *Ibid.* 726; against a Bishop, *quare*, when not, 1 Bos. & Pul. 105; but see 3 Swanst. 493, 499.
 (f) *Ibid.* 728.

(g) *Ibid.* 729.
 (h) *Post*, 417, 418.
 (i) *Ante*, vol. i. 733; *Smith's Ch. Pr.* 363, 367.
 (k) *Ibid.* 731.
 (l) *Ibid.* 734.
 (m) *Att.-Gen. v. Vernon*, 277, 370; 2 Chan. R. 353, S. C., and *Chitty's Eq. Dig. tit. Letters Patent*.
 (n) *St. John v. Gurner*, 1 Equ. Ab. 258; and see relief at law in *Conry v. Caulfield*, 2 Ball & B. 272.
 (o) *Fullagar v. Clark*, 18 Vcs. 483; and see instances, *Blackford v. Christian*, Knapp's R. 73; *Diarmed v. Diarmed*, 3 Wils. & Shaw, 37, and 4 Wils. & Shaw, 346.

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Injunctions
to prevent or
restrain actions
or proceedings
at law. (u)

a creditor or third person, as a landlord, may file a bill to discover and have relief against the fraud affecting his interest. (t)

A bill for an injunction to restrain or controul proceedings at law or in other Courts, is one of the most useful parts of the jurisdiction of a Court of *Equity*, and is very extensive in its operation. When the defence is not at law, but only in equity, then a bill for an injunction is absolutely necessary; (u) and the bill must be filed as early as possible after the proceeding at law has commenced: for if there be any delay, we have seen that it may be too late to obtain relief. (x) And indeed when it is expected that the unjust proceeding at law will be founded on any deed or instrument obtained by undue means, a bill may and ought to be filed in anticipation, praying that it may be delivered up to be cancelled; (y) because if a bill be not filed until after commencement of proceedings at law, then the party praying relief may have to bring the money into Court. (z) A bill of this nature is also essential when a legal right of action has been improperly exercised, as if repeated actions for breaches of covenant or non-payment of rent have vexatiously been instituted by a landlord against his tenant. (a) It seems that an injunction may be obtained in Chancery to prevent proceedings in Scotland: for although the Court may have no jurisdiction over foreign Courts, yet the injunction will operate in personam. (b) If an attorney or solicitor proceed in an action at law for the amount of his bill of costs, pending or immediately after taxation of his bill, and before the costs of the taxation have been ascertained, he may be restrained by bill and injunction. (c)

An injunction of this nature (i. e. to stay proceedings at law) is in some respects preferable in its operation when obtained on the equity side of the *Court of Exchequer* than when obtained in Chancery; because, when obtained in the former Court, at whatever stage of the action before trial, it stays the trial and all pro-

(t) *Bennett v. Musgrove*, 2 Ves. 51, as to the remedy at law in case of a fraudulent warrant of attorney, *Martin v. Martin*, 3 B. & Adol. 934; ante, 336.

(u) See in general Chit. Eq. Dig. Practice, xlv. 12, 1045 to 1053; and see *ibid.* 1037; Eden, on Inj. 1 to 143, and 332. It is doubtful whether the circumstance of a plaintiff having committed a felony will induce a Court of Equity summarily or otherwise to prevent him from suing; though it seems that a Court of Law may so interfere. *Muro v. Kay*, 4 Taunt. 34; see *Willingham v. Joyce*, 3 Ves. J. 168; 1 Mad. Ch. Pr. 421. As to staying an action by an attorney, see

1 Clark & Fin. 125.

(x) *Ante*, 303, cites *R. v. Peto*, 1 Y. & Jerv. 169.

(y) *Ante*, vol. i. 706, 707, 709, 710.

(z) *Ante*, vol. i. 709.

(a) *Waters v. Taylor*, 2 Vesey & B. 302. The case of *rent* is the only one in which a Court of Equity will interfere by injunction to restrain proceedings at law upon a breach of covenant. *White v. Warner*, 2 Meriv. 459.

(b) 5 Madd. R. 297; 2 Swanst. 315.

(c) *Barr v. Wiggins*, 1 Clark & Fin. 125; *Wulton v. Johnson*, 2 Sim. 450; 2 B. & Ald. 745.

ceedings, as well as executions. Whereas in Chancery, unless the injunction be obtained *before declaration*, it does not stay trial but merely execution; (d) unless a special injunction can be obtained, (e) as sometimes is the case, upon a positive affidavit that the party cannot safely try without the plaintiff's answer being first filed. (e) Sometimes, however, the Court of Exchequer will, on motion, permit notice of trial to be given on an undertaking not to sue out execution. (f)

When a plaintiff at law expects that the defendant is about to file a bill in Chancery, and try to obtain an injunction so as to stay trial, then to prevent the defendant at law from obtaining the common injunction for want of an answer to the bill in due time, he should immediately prepare a very full statement of all the facts which he expects will be charged in the defendant's bill, and full instructions for his answer, and have the draft of such answer prepared as far as he can.

We have in the preceding volume stated the practice in obtaining some injunctions. (g) When a bill for an injunction is filed after arrest at law, no injunction is to be granted without bringing the principal sum into Court, except there appear in the defendant's answer, or by written evidence, plain matter tending to discharge the debt in equity; (g) and after a verdict at law for the plaintiff, an injunction cannot in any case be obtained without bringing the amount of the verdict into Court. (h)

So it has been long established that a bill lies, not only for an *injunction to stay proceedings* in an action at law *before judgment*, but also in some cases, and under strong circumstances, to *prevent execution upon a judgment* in any other Court, whether inferior or superior. (i) Thus equity will relieve even after a verdict at law, when the plaintiff knew the fact to be otherwise than what the jury found, and the defendant was ignorant thereof at the trial, (k) and where the defendant at law could not find the receipt for the debt sued for until

(d) 1 Madd. Ch. Pr. 132, 133; Smith's Ch. Pr. 478; *Earnshaw v. Thornhill*, 18 Ves. 488; *Garlick v. Pearson*, 10 Ves. 450; *Mills v. Cobby*, 1 Meriv. 3; 2 Kel. R. 17, pl. 5.

(e) Smith's Ch. Pr. 452, 464; 1 Ves. & B. 366; 1 Sim. & Stu. 102; 1 Sim. 510; 3 Madd. R. 102; *Earnshaw v. Thornhill*, 18 Ves. 488; Chit. Eq. Dig. 1050.

(f) *Legg v. Datasta*, 3 Woode. V. L. 410, 411, in note.

(g) *Apte*, vol. i. 700; Beame's Ord. 15; Smith's Ch. Pr. 457; Chitty's Eq. Dig. 1052.

(h) Smith's Ch. Pr. 457; *Culley v. Hickley*, 2 Bro. C. C. 182; *Sherwood v. White*, 1 Bro. C. C. 453.

(i) Bacon's Works, vol. iv. 611, 682; 1 Chan. Rep. App. 26; 3 Bla. C. 34, 55; *artc.*, vol. i. 731, note (u); Com. Dig. Chancery, C. note (m), 5 edit.; Decree in Spiritual Court, *Vanbrugh v. Cock*, 1 Chan. Cas. 200; Admiralty, 1 Hagg. Ad. R. 196, in note.

(k) *Williams v. Lee*, 3 Atk. 223; 2 Ves. 135; *Bateman v. Willoe*, 1 Schol. & Lef. 205; and see 1 Hagg. Ad. R. 196.

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after the trial, equity relieved. (*l*) So *newly discovered* evidence of fraud may induce a Court of Equity, if not a Court of Law, *to open an award* upon a matter of fact. (*m*) But in these cases, in order to found a title to relief in equity, it is not sufficient to shew generally that injustice has been done; but it must be shewn specially that the Court of Equity is warranted to interfere; and equity is not so warranted merely on the ground that an unconscientious verdict has been had at law against the plaintiff, if he could by reasonable exertion have laid that ground before a Court of law on the trial. (*n*) And where a bill was filed, alleging fraud as to quantity and quality of goods sold, but not discovered till they had been exported to America, and that they were there sold at a loss; and that the defendant, being threatened with an action, *paid the original price*, according to the *contract*, under a *protest* that he would seek relief in equity; and praying an account and payment in respect of the loss, and a commission to America, a demurrer to such bill was allowed; because, instead of paying the money, although under protest, the party should have filed a bill for an injunction against the claim of the money, and not having done so, he could not recover back the amount in a Court of Equity any more than he could at law. (*o*) And in general a party who has mistaken or misshapen his defence at law, cannot apply for relief in equity. (*p*) Such an injunction is not like a writ of prohibition from a Court of law directed to the other Court or its officer, but merely operates in personam, and prohibits the party to the suit in the other Court from proceeding, and if he do, subjects him to an attachment for his contempt. When a bill for an injunction has been filed, the creditor or claimant should take care, if the statute of limitations would otherwise operate as a legal bar, either at once to commence by regular process his proper action at law, and enter continuance on the roll, or take care to obtain an express decree or order of the Court of Equity, that the defendant shall not hereafter plead the statute of limitations. (*q*)

Bills of Peace, formerly frequent, were of this nature, and

(*l*) *Gainsborough v. Gifford*, 2 P. Wms. 424. When a Court of law will not grant a new trial on account of newly discovered evidence, Tidd, 906, 907.

(*m*) *Eardley v. Otley*, 2 Chitty's R. 42; *Auriol v. Smith*, 1 Turn. & Russ. 127; *Mitchel v. Harris*, 2 Ves. jun. 134; 4 Bro. C. C. 3; *Bateman v. Willoe*, 1 Schol. &

Lef. 205.

(*n*) *Bateman v. Willoe*, 1 Schol. & Lef. 201, 205; 14 Ves. 31; *R. v. Peto*, 1 Young & Jerv. 169.

(*o*) *Kemp v. Pryor*, 7 Ves. 237; *Bilbie v. Lumley*, 2 East, 469, at law, S. P.

(*p*) *Evans v. Solly*, 9 Price, 525.

(*q*) *Ante*, vol. i. 781,

were sustainable not between two individuals only, but where numerous parties on separate rights were interested. (r) As where a man claims an exclusive right, and the persons who controvert it are numerous, and he can not by one action at law quiet that right, in this case he may file a bill of *peace*, and the Court would direct an issue to determine the right, as between lords of manors and their tenant or tenants of one manor and another; (s) and perpetual injunctions are now frequently granted after several trials at law. (t)

Bills for Relief against Forfeitures, as those occasioned by non-payment of rent, or other sums of money, may also be here arranged. (u)

Bills for relief against Forfeitures.

Somewhat analogous to the equitable jurisdiction of staying an action at law, is the equitable jurisdiction of preventing a defendant at law from setting up some formal legal defence, when the so doing would prevent the just investigation of a legal right. Of this description are bills in equity to prevent a defendant in ejectment from setting up an outstanding term, which, though vested in some trustee to attend the inheritance, might otherwise constitute an impediment and ground of nonsuit. (y) So we have seen that by a proper application to a Court of equity in anticipation, a defendant at law may be prevented from pleading the statute of limitations, though the mere pendency of proceedings in equity will not constitute any adequate excuse for delay in commencing proceedings at law. (z) So if a defendant have obtained a release by undue means, a bill may be sustained to defeat the effect of such release, (a) although a Court of law will also in some cases prevent a party using a release so obtained on motion and rule. (b)

Bills for an injunction to prevent setting up outstanding terms or other legal defence. (x)

We have seen the common law and statutory jurisdiction of Courts of law to interfere when there are several adverse

Bills of interpleader. (c)

(r) 2 Atk. 483; 4 Bro. C. C. 157; 3 P. Wms. 156; *ante*, vol. i. 731.

(s) 2 Atk. 483, and Chit. Eq. Dig. Bill of Peace; 3 Bla. 427, in notes; *ante*, vol. i. 726.

(t) 4 Bro. P. C. 373; Chit. Eq. Dig. Practice, Injunction, 5; *Waters v. Taylor*, 2 Ves. & B. 302.

(u) Chit. Eq. Dig. tit. Forfeiture, 454; tit. Compensation, p. 221, 222; when or not a Court of Equity will relieve, *ante*, vol. i. 290.

(x) See in general Chit. Eq. D. 1035; 1 Mad. Ch. Pr. 157.

(y) 1 Mad. Ch. Pr. 157, 158, 201, 202; *Hopkins v. Bond*, 1 Scho. & Lef.

429, 431.

(z) *Ante*, vol. i. 711, 781; *Clarke v. Labley*, 2 Cox, 173; *Sirdefield v. Price*, 2 Young & J. 73; *supra*, 416.

(a) *Pascoe v. Pascoe*, 2 Cox, 109.

(b) *Mountstephen v. Brook*, 1 Chit. R. 390, and note; 3 B. & Ald. 141; 1 B. & Ald. 224.

(c) See in general Smith's Ch. Pr. 350 to 357; 1 Mad. Ch. Pr. 173; see cases Chit. Eq. Dig. Pleading, 48; Bill of Interpleader, p. 780, 781, 590 and 824; Mitford's Pl. 39; 1 Mad. Ch. Pr. 173; *Eden's Inj.* 355 to 349; *Cornish v. Tanner*, 1 Young & J. 353.

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claimants. (d) A bill of *Interpleader in equity* will lie to prevent fraud or injustice, where two or more parties claim adversely to each other from a party in possession of personal or real property, so as to prevent them from both suing him, and to compel the two claimants to settle their rights before the person holding possession be required to give up to either. (e) But unless the party still retain possession, he cannot apply for this bill. (f) Thus a captain of a ship, or any agent or party, holding goods or money not for his own use, may file an interpleader, where parties claim adversely under bills of lading, &c. (g) But the defendant must not set up any claim on his own account, and therefore if an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insist upon retaining either his commission or the duty, (h) and the defendant must not in any respect have been a wrongdoer; and on that account, where a sheriff had seized goods against a defendant in an execution, and a third person claimed them, he could not have an interpleader, because he must, if the goods were the property of the latter, admit he had made a tortious seizure. (i) But no bill of interpleader will be entertained when the claim is very small, as under 10*l.* (k) And before any proceedings, the party should apply to each other, and if they refuse to indemnify him on reasonable terms, he will recover his costs either as between both the claimants or against him who occasioned the bill. (l) But a bill of interpleader lies, if adverse claims have been made, although no suit has been commenced by either claimant. (m) In equity a party filing a bill of interpleader is entitled to his costs, unless there has been collusion. (n) In some cases, even since the recent act, affording relief at law, it may still be necessary to resort to a Court of Equity; as if the action be not in the form mentioned in the act, or one or more of the claimants is out of the kingdom. Thus a bill of interpleader was sustained, where all the defendants but one resided out of the jurisdiction, i. e. in Scotland, and the plaintiff having shewn that he had used due diligence to bring the parties into Court, was decreed to give up the subject to the only defendant who had appeared, and was

(d) *Ante*, this vol. 341 to 346.

(e) 2 Ves. jun. 310; Mitford's Pl. 39; 1 Mad. Ch. 173.

(f) *Burnett v. Anderson*, 1 Meriv. 405.

(g) *Low v. Henderson*, 3 Mad. 277; see numerous instances, Chit. Eq. Dig. 780, 781.

(h) *Mitchell v. Hayne*, 2 Sim. & Stu. 63; same rule at law, *ante*, 345, 346; *Brad-*

dock v. Smith, 9 Bing. 81; 2 Moore & S. 131; but see the distinction there taken.

(i) *Slingsby v. Bolton*, 1 Ves. & B. 354.

(k) *Smith v. Targett*, 2 Austr. 530; Chit. Eq. Dig. Jurisdiction, 599.

(l) 1 Mad. Ch. Pr. 180, 181.

(m) 15 Ves. jun. 245; 16 Ves. 203.

(n) 1 Sim. & Stu. 462.

protected against the others by injunction, and it was ordered that service on the attorney should be good. (o)

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Bills for discovery. (p)

We have seen that Courts of Law have not (except in the case of summary motions and affidavits in answer) any power or jurisdiction to compel a defendant to *discover* any facts or evidence in favour of the plaintiff, or to compel the plaintiff to admit any facts favourable to a defence, but that a Court of Equity has exclusive jurisdiction in this respect. (q) It, therefore, is frequently necessary to file a bill in equity *merely* for a discovery of facts in aid of the plaintiff or defendant at law, and without *praying relief*, because the facts, when discovered, disclose and establish a *legal* right of action, or a legal ground of defence. (r) In many cases, as those of account, where Courts of Equity and Law have concurrent jurisdiction, and in all cases where the remedy or the defence is peculiarly in equity, then, besides praying an account, &c. the bill may also pray relief. (s) The rule in equity, that a party is not bound to disclose his own case, is confined to mere matter of *title* and criminal acts, and does not extend to matters of account. (t) We have already made some observations upon the nature and utility of a bill for a discovery, (u) and the proceeding will be further noticed in the course of this volume.

The lessor of the plaintiff, in an action of ejectment, may in some cases, as where he claims in part under the same title as that of the defendant, file a bill of discovery to ascertain the grounds upon which the defendant claims; (v) and on the other hand a defendant at law in such action may file a similar bill to discover on what grounds the lessor of the plaintiff is proceeding at law. Thus any person in possession of an estate as tenant or otherwise, may file a bill for a discovery of the title of a party bringing an action of ejectment against him, even though he be himself a wrongdoer against every body; (y) and where an estate is considerable, or the defence at law would be expensive, or it may be important to be prepared to answer the

(o) *Stevenson v. Anderson*, 2 Ves. & B. 407.

(p) As to bills of discovery, Smith's Ch. Pr. 375 to 381, 362, 363; 1 Mad. Ch. Pr. 196 to 218, and *post*.

(q) *Ante*, this volume, 49 to 52.

(r) As to bills of discovery in general, see this volume, *ante*, 54; and as to the antecedent precautionary proceedings as affecting costs, *id.*; and *ante*, vol. 1, 439; and *Weymouth v. Boyer*, 1 Ves. jun. 423.

(s) See in general 1 Mad. Ch. Pr. 196 to 216; Chit. Eq. Dig. Pleading, 778, 780; Practice, 889, 929.

(t) *Corbell v. Hawkins*, 1 Young. & J. 425.

(u) *Ante*, this vol. 49 to 55.

(v) 1 Mad. Ch. Pr. 200 to 206; 13 Ves. 251; Chit. Eq. Dig. Pleading, 761, 778, 1281; but not without shewing in bill that both parties claim under same title; *Mutloe v. Smith*, 5 Anstr. 709; *Baker v. Booker*, 6 Price, 379; *Joy v. Kekewich*, 2 Ves. jun. 679; *Lewther v. Troy*, 1 Ridg. L. & S. 192.

(y) *Metcalf v. Harcey*, 1 Ves. 218; 1 Mad. Ch. Pr. 206.

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plaintiff's case at law, the filing such a bill may be extremely advisable. But although an heir out of possession is entitled to a discovery of deeds, and some facts necessary to support his legal title, he cannot file a bill merely for the recovery of the possession of the estate or of the title deeds, for they are properly to be recovered at law and not in equity. (z)

Bills for assignment of *Dower* also are proceeded upon in equity, though a writ of dower in the Common Pleas is sometimes preferable, when the husband died seized, in order to recover *damages* and costs, and is one of the ancient actions retained by 3 & 4 W. 4, c. 27, s. 36. (a)

Bills for *Partition* or apportionment between joint tenants and tenants in common, were always sustainable and decreed in equity; (b) and since the abolition of the writ of partition at law, by 3 & 4 W. 4, c. 27, s. 36, such bills are the only mode of effecting a division; and before that act, whenever one of the parties interested was an infant, or when the estate of either was in remainder or reversion, it was always absolutely essential to file a bill. (c) And another advantage attends the proceeding in equity, viz. that in case of any mistake in the division, by which more was allotted to one party than the other, compensation may be awarded by the Court of Equity. (d) But Chancery has no jurisdiction to make partitions between tenants in common of copyhold. (e)

Bills for *Contribution* between sureties we have seen may, in the event of the insolvency of one or more of the sureties, be preferable to an action. (f)

Bills to *establish a Modus* are also cognizable in equity; but a person is not allowed to file such a bill, unless he has been actually disturbed by proceedings at law or in equity, or in the Ecclesiastical Court, as by an action at law against a parishioner for not setting out tithe in kind, in which case the defendant, insisting on a modus, may file such a bill, being in the nature of a cross bill. (g)

(z) *Crow v. Tyrell*, 3 Mad. Rep. 132; *Armitage v. Wadsworth*, 1 Mad. 189; *Pulleney v. Warren*, 6 Ves. 89.

(a) 2 Saund. R. 43, n. 1 to 43, n. 43; *Mundy v. Mundy*, 4 Bro. C. C. 294; 2 Ves. jun. 122, 128; *Curtis v. Curtis*, 2 Bro. C. C. 620; *Dorner v. Fortescue*, 3 Atk. 130; Chit. Eq. Dig. Dower, 1 Mad. Ch. Pr. 242, 243, &c.

(b) 2 Ves. jun. 124.

(c) 1 Mad. Ch. Pr. 244, 246; 2 Id. 170; *Smith's Ch. Pr.* 358 to 362; *Mitford*, 110; Chit. Col. Stat. 624, n. (d);

2 Swanst. 546.

(d) *Dacre v. Gorges*, 2 Sim. & Stu. 454.

(e) *Scott v. Fawcett*, Dick. 299.

(f) When preferable in equity to an action at law, *ante*, 303; *Peter v. Rich*, Chan. Cases, 34; *Brown v. Lee*, 6 Bar. & Cres. 689.

(g) 1 Mad. Ch. Pr. 250, 128; *Gordon v. Simpkinson*, 11 Ves. 510; *Warden of St. Paul's v. Crickett*, 2 Ves. jun. 563; and *Warden of St. Paul's v. Morris*, 9 Ves. 563.

Bills to *Marshal Assets* are exclusively sustainable in this Court, and is the only mode by which, when specialty creditors have exhausted the personal assets, simple contract creditors, and even legatees, may, to the extent of the personal assets so applied, stand in their place. (*h*) Bills to *Secure Property* in litigation in other Courts, as to compel an executor or administrator to bring the assets into Court, can *only* be filed in a Court of Equity. (*i*)

Bills to compel the *lord of a manor* to hold a Court, or admit a copyholder, are also sustainable, though the jurisdiction at law in King's Bench by mandamus is in general preferable. (*k*)

Another mode of preventing fraud is the securing and enforcing the disclosure of evidence. At common law and before the statute 13 G. 3, c. 63, as to *India*, and the general act 1 W. 4, c. 22, only a Court of Equity could, in aid of an action in a Common Law Court, *compel* an obstinate party to a suit to consent to the issuing of a *commission* to examine witnesses abroad on *interrogatories*, and consequently that power constituted an important and valuable branch of jurisdiction in equity; (*l*) and such jurisdiction still continues, though there will be comparatively little occasion to exercise it. (*m*)

In aid of other Courts, as by commission to examine witnesses on interrogatories.

The care of *Infants* and *their property* has been usually arranged as the *fourth* head of equitable jurisdiction, (*n*) and which jurisdiction reverted to this Court upon the dissolution of the Court of Wards and Liveries, and in some of the books the prerogative of the king, as *pater patriæ*, is described as if he by the Lord High Chancellor takes care of *all* infants, and the Chancellor might exercise jurisdiction over every infant. But we have seen that the prerogative is never exercised excepting when the infant *has property* to take care of, and then incidentally the person as well as property will be protected, at least after the infant has been constituted a ward of chancery; (*o*) and we have seen that by a donation of even £5 any infant may be constituted a ward of the Court for all beneficial

4. Infants.

(*h*) Com. Dig. tit. Chancery, Appendix, Marshalling. In 3 Bla. Com. 227, in notes; 3 Woode. Vin. Lec., the student will find an explicit account of marshalling assets; and see a luminous case, *Aldrich v. Cooper*, 8 Ves. 338, 339; 1 Mad. Ch. Pr. 250.

(*i*) *Ante*, vol. i. 551, 715, 716; *Sharples v. Sharples*, McCl. Rep. 506.

(*k*) *Ante*, vol. i. 792, 794.

(*l*) See *ante*, 3 Bla. C. 382, 383, 438, 449; and see the practice as to bills in equity for such commissions, Smith's Ch.

Pr. 577 to 582; Chit. Eq. Dig. tit. Practice, 1017 to 1024; 2 Madd. Ch. Pr. 405; Newl. Ch. Pr. 117.

(*m*) Smith's Ch. Pr. 381.

(*n*) 1 Madd. Ch. Pr. 23, 331; Chitty's Eq. Dig. tit. Jurisdiction, x. p. 599, 600; and see 6 G. 4, c. 74, s. 12, *ante*, 408.

(*o*) *In re Talbot*, *coram* Lord Eldon, April, 1815, *ante*, vol. i. 64, note (*z*), 66, 68, 810; Smith's Ch. Pr. 505 to 512; 1 Newl. Ch. Pr. 2d ed. 151; 1 Madd. Ch. Pr. 331 to 360.

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purposes. (p) This jurisdiction over a ward extends beyond the age of twenty-one, and until all the objects of the guardianship have been fulfilled. (q) We have considered much of the jurisdiction over infants in the preceding volume. (r) The consideration of the whole jurisdiction would be too voluminous for this general treatise. (s) With the exception of the interference of a Court of Law under a writ of habeas corpus, which, as regards infants, we have considered, the Chancellor has exclusive jurisdiction over infants and their estates, and the Court of King's Bench has not any of the delegated authority which belongs to the Chancellor, nor has the Court of Exchequer. (t) In many respects *property* belonging to *infants*, *femes covert*, *idiots*, *lunatics*, persons of unsound mind, and persons out of the jurisdiction of the Court of Chancery, is regulated and guarded by the Consolidating Act, 1 W. 4, c. 65. (u)

5. Specific performance of agreements and other specific relief.

The *fifthly* enumerated branch of equitable jurisdiction is the enforcing *Specific Performance of Agreements*, to which may be added some other instances of *Specific Relief*. (v) This is one of the most peculiar and important branches of equitable jurisdiction, and has been justly considered the most useful, (x) for whilst at law, (excepting in the action of *detinue* for a chattel, and in *ejectment* for the recovery of buildings or land,) *damages* only and not the thing itself can be recovered; (y) yet by bill in equity a decree may be obtained that the complainant shall have from the opponent the precise performance of his agreement in certain cases, and in general the costs of the suit. This jurisdiction is analogous in some respects to the writ of mandamus at law, commanding the party to whom the writ is directed to perform some act; but then such mandamus, as we have seen, is in general confined to public matters or public officers, whilst a bill for specific performance is principally a private remedy. (z) We have in the preceding volume fully stated when a Court of Equity will decree the *specific delivery* of certain chattels, as heir looms or title-deeds, specific bequests, and other articles, (a) and when the *payment of a legacy*

(p) *Ante*, vol. i. 810, 702, n. (c); or even filing a bill, 1 Madd. Ch. Pr. 332.

(q) 3 Swanst. 69.

(r) *Ante*, vol. i. 61 to 71.

(s) 1 Madd. Ch. Pr. 351 to 360; Chitty's Eq. Dig. tit. Infant, 527 to 543.

(t) 2 P. Wms. 116; 1 Madd. Ch. Pr. 331.

(u) See 1 Dowl. Stat. 310 and notes.

(v) See division, *ante*, 408. and in ge-

neral 1 Madd. Ch. Pr. 23, 360 to 444; Smith's Ch. Pr. 367 to 370.

(z) Per Lord Hardwicke, *Penn v. Lord Baltimore*, 1 Ves. 446.

(y) *Alley v. Deschamps*, 13 Ves. 222; 1 Madd. Ch. Pr. 360.

(z) See observations, *ante*, vol. i. 787 to 871.

(a) *Ante*, vol. i. 812 to 816.

may be enforced in equity, and when or not that remedy is preferable to a proceeding in the Ecclesiastical Court, (c) and when the delivery of a proper deed or bill or other security may be decreed even against a surety; (d) and we have at great length examined the principles, rules, and decisions governing bills for specific performance of marriage articles and contracts and covenants, (e) so that any further observations in this place would be useless repetition.

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Sixthly, The very important and extensive jurisdiction over *Trusts* and *trustees* (including *executors*,) constitutes the last head of the division of equitable jurisdiction, and it is a principal and exclusive branch, and includes not only those *express trusts* created by deed or will, but also those which are *implied* from the circumstance of the party having accepted some office, as that of *executor* or *administrator*, and the incident jurisdiction over *legacies*, with the power over trustees of different descriptions. (g)

6. Trusts,
executors, and
legacies. (f)

A cestui que trust, or person beneficially but not legally interested, can in no case sue his *trustee* at law for any misconduct, but must file a bill. (h) But in equity trustees are liable for any abuse of trust, although the deed appointing them contain the usual indemnity clause, as if there be two trustees and both suffer a debt from one of them to remain long outstanding and a loss arise, (i) though where there is an express clause that each trustee shall be liable only for one moiety the Court will not extend the liability. (k) If trustees refuse to act when they ought, the only safe course is to file a bill to compel them; though it is usual at law, if it be necessary to proceed in ejectment on their demise, to tender them an adequate indemnity, or rather draft of an indemnity bond, with sufficient sureties, to secure them against all liability for costs, and then to proceed in an action of ejectment on their demise, or other action at law; after which, if the proceeding be proper and they attempt to impede the recovery, a Court of Equity would subject them to costs and perhaps other loss. This course of proceeding saves the delay and expense of a formal suit in equity to compel them to act.

(c) *Ante*, vol. i. 815, 816; but see a very summary remedy in Eccles. Court, *post*.

(d) *Ante*, vol. i. 123, 304, 710, 711; *Rawstone v. Parr*, 3 Russ. 424, 529.

(e) *Ante*, vol. i. 820 to 871; and see *Analysis*, *id.* 824, 825, &c.; 1 Madd. Ch. Pr. 360 to 444; Smith's Ch. Pr. 367 to 370.

(f) See in general 1 Madd. Ch. Pr.

444, to vol. ii. 163.

(g) See in general, as to the equitable jurisdiction over trusts and trustees, 1 Fonblan. Eq. 9. We have seen that a cestui que trust cannot in general sue at law, *ante*, 6 to 8.

(h) Sanders on Uses and Trusts.

(i) *Mucklow v. Fuller*, 1 Jac. 198; 3 Swanst. 78; Chitty's Eq. Dig. 1310.

(k) *Birls v. Betty*, 6 Madd. 90.

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Executors.

We have seen that to secure a just and equal distribution of assets and prevent an *Executor* from preferring one creditor to another of equal degree, when there are not assets to *pay all* the debts, that it is frequently advisable for one creditor very shortly after the death to file a bill in Chancery or the Exchequer, on behalf of himself and other creditors, against the executor or administrator, requiring him to account and distribute equally, and upon which a proper distribution will be decreed; and, as observed by Sir J. Mansfield, when an executor is pressed by some creditors more than others, it is advisable for him to get some friendly creditor to file such bill, thereby enabling him to secure a just or equal distribution. (l)

Legacies.

Suits for *Legacies* charged upon or to be paid out of *personal* estates were originally and properly cognizable in the Ecclesiastical Courts as a branch of that testamentary jurisdiction which undoubtedly belongs to them; but legatees instituting suits there, finding the authority of those Courts inadequate to enforce a *full discovery of assets*, have been frequently driven into equity for that purpose; and therefore to save a circuitry or multiplicity of suits and in case of the suitor, Courts of Equity exercised complete jurisdiction in the matter, as well by enforcing the *discovery* as by decreeing *payment* of the legacy, on the ground that the executor was in the nature of a *trustee* for the parties beneficially interested. But in the exercise of this concurrent or preferable jurisdiction Courts of Equity necessarily adopted the law of that forum in which the suit was originally cognizable, and therefore it is that where a suit instituted in equity for payment of a legacy payable out of the personal estate, if a question arise upon the right of the legatee to demand payment, it is governed by the civil law; whereas, if the legacy is charged upon a *real estate* the rules of the common law prevail; because in the latter case the jurisdiction of the temporal Court is original and exclusive. (m) When a *legacy* has been bequeathed to a *married* woman Courts of Equity exercise an exclusive jurisdiction, and will on a bill filed grant an injunction, so as to prevent her husband from proceeding in the Spiritual Court to obtain payment, because the latter Court cannot impose any terms or compel the husband to make an adequate provision or settlement on his wife as the

(l) Per Sir J. Mansfield, in *Brady v. Shiel*, 1 Campb. 148; *Nunn v. Barlow*, 1 Sim. & Stu. 588, ante, vol. i. 545.

(m) *Keily v. Monck*, 3 Ridgw. P. C.; 243; *Kendall v. Kendall*, 4 Russ. Rep. 370; ante, vol. i. 112. In case of a de-

visé of real estate to pay debts, a Court of Equity has exclusive jurisdiction, and an Ecclesiastical no jurisdiction, over the will, as it relates to the realty, *Barker v. May*, 9 Bar. & Cres. 489.

Court of Chancery can oblige him to do before he will be permitted to receive the legacy. (n) So where a *father* has instituted a suit in a Spiritual Court for an *infant's* legacy, the Court of Chancery will grant an injunction so as to prevent the money from getting into the father's power. (o) In these cases the proceeding is not by *prohibition*, because the Ecclesiastical Court has jurisdiction, but by injunction operating in personam against the husband and father; and the Court of Equity merely interferes in consequence of its general jurisdiction over trustees and to protect the interest of married women and infants. (p) And in all cases of legacies, where there is a *continuing trust* or *any thing like a trust*, the Court of Chancery will grant an injunction, because trusts are peculiarly proper for the cognizance of that Court. (p)

There is, we have seen, a great advantage in favour of a creditor, or legatee or next of kin proceeding in a Court of Equity, either Chancery or Exchequer, by bill *against an executor or administrator*, than in the Ecclesiastical Court, because in the former the fund may be secured in Court, and the executor's account and oath are not conclusive, (q) and a legatee instituting such a suit will be entitled to costs out of the estate. (r) Besides, when legacies are charged upon *real* property the Ecclesiastical Court has no jurisdiction whatever, and in that case the only remedy is in this Court. (s)

Thirdly, is the *Statutory Jurisdiction* of this Court under several express enactments, as 1st, constituting the Court of Chancery a Court of Review, (as formerly the Delegates, now repealed and vested in the judicial committee of the Privy Council, under the 2 & 3 W. 4, c. 93, and 3 & 4 W. 4, c. 41); 2dly, formerly a Court of bankruptcy, under the then existing Bankrupt Acts, but which jurisdiction has been principally

Thirdly, The statutory jurisdiction of the Chancellor and Chancery. (t)

(n) *Jewson v. Moulton*, 2 Atk. 420; *Blount v. Bestland*, and *Meals v. Meals*, 5 Ves. 517; 1 Madd. Ch. Pr. 129, when or not Chancery will oblige husband to settle the legacy left to his wife, *Harrison v. Buckle*, 1 Stra. 239; *Ranking v. Barnard*, 5 Madd. 32; *Campbell v. French*, 3 Ves. 323; Chitty's Eq. Dig. 510, 519 to 523, 639; when or not a legacy is considered given to a married woman for her separate use, *id. ibid.*; *Norris v. Hemingway*, 1 Haggard's Rep. 4, and *ante*, vol. i. 61; a husband cannot sue at law, *Macaulay v. Phillips*, 4 Ves. 19; and why, *ante*, vol. i. 7.

(o) *Rotherham v. Fanshaw*, 3 Atk. 629; 1 Madd. Ch. Pr. 130. A personal legacy

given to an infant is more properly cognizable in Chancery than in the Ecclesiastical Court, *Harrell v. Walden*, 1 Vern. 26.

(p) *Anonymous*, 1 Atk. 491; *Stonehouse v. Stonehouse*, 1 Dick. 98; 1 Madd. Ch. Pr. 130.

(q) *Ante*, vol. i. 816; *Redes. Tr. Pl.* 110; 2 Madd. Ch. Pr. 3; *Sharples v. Sharples*, M'Clel. R. 506.

(r) *Sharples v. Sharples*, M'Clel. R. 506; as to costs of such a suit in general, 2 Madd. Ch. Pr. 557.

(s) *Barker v. May*, 9 B. & C. 489; *ante*, vol. i. 112, note (e), and 816.

(t) See division, *ante*, 405; 1 Madd. Ch. Pr. 1, 2, 586 to 723.

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transferred to the Bankruptcy Courts, and to the principal of those Courts being the Court of Review, by 1 & 2 W. 4, c. 56, but affording an appeal on a case stated to the Chancellor; 3dly, the statutes relative to *charitable* uses; (u) 4thly, the arbitration acts; 5thly, the friendly societies acts; (x) and 6thly, various other acts.

Fourthly, The specially delegated jurisdiction. (y)

Fourthly, are the *specially delegated* branches of *jurisdiction*, as that relating to *idiots* and *lunatics*, which is vested in the Chancellor or the Court of Chancery exclusively by various statutes, ancient and modern, (z) excepting as regards the power to apprehend a lunatic to prevent mischief, which we have stated, (a) and some regulations of a general nature relative to pauper lunatics. (b) So in case justices of the peace should refuse to grant a licence to a party to keep a lunatic asylum, he may petition the Chancellor not to sanction such refusal. (c)

The principal peculiarities in the jurisdiction of Courts of Equity.

Having thus given an outline of the principal instances in which the Chancellor or the Court of Chancery has jurisdiction, we will now notice what circumstances *particularly distinguish* this Court and jurisdiction from the Courts of Law. It is difficult to state which of these several subjects is the most important branch of jurisdiction, but perhaps the principal are the exclusive jurisdiction over cases strictly of *uses and trust* not executed *at law*, and in which a Court of Law cannot directly recognize the beneficial interest of the cestui que trust, and which more particularly relate to *real* property and proceedings against *trustees*, where Courts of Equity have exclusive jurisdiction. We have seen that Courts of Law will not in general

(u) See Chit. Eq. Dig. Jurisdiction, xii. p. 601; and *id.* tit. Charity. The 57 G. 3, c. 39, empowers the Court of Chancery to make *summary orders* without suit in matters of charity, or benefit or friendly societies. *In re Friendly Society*, 1 Sim. & Stu. 82.

(x) See the older acts and decisions, 2 Mad. Ch. Pr. 718; 1 Montague Bankr. L. The 10 G. 4, c. 56, s. 15, and 4 & 5 W. 4, c. 40, appears to relieve this Court from any statutory duties, Chit. Eq. Dig. 602. Although the Chancellor may still have much superintending jurisdiction, as over other trusts and matters of account between partners, &c.

(y) See division, *ante*, 405; 1 Mad. Ch. Pr. 1; 2 *Id.* 723 to 757.

(z) See the older statutes and decisions 2 Mad. Ch. Pr. 723 to 757; 1 W. 4, c. 60 and 65; 1 Dowl. Stat. 310; 2 & 3 W. 4, c. 107; 3 Dowl. Stat. 677, and notes; 3 & 4 W. 4, c. 36, for diminishing expenses of commissions of lunatico inquiring; and see *Grosvenor v. Drax*, 2 Knapp, 82.

(a) *Ante*, vol. i. 670, 671; 1 Newland Ch. Pr. 163, 2d edit.; Chit. Eq. Dig. Jurisdiction, xi. p. 601, and tit. Lunacy.

(b) *Ibid.*; *ante*, vol. i. 826; and Burn's J. tit. Lunatics.

(c) *In re Taylor*, Court of Chancery, 24 July, 1834. But see in general that Chancery has no jurisdiction over justices of peace excepting to place them in office, &c. 2 Mad. Ch. Pr. 720, 721.

take notice of *mere equitable rights*, or at least will not exercise any jurisdiction over trustees, for adequate reasons stated in a preceding page, (d) and that even if a judge of a Court of Equity send to a Court of Law a case stated as *a trust*, the judges of the latter will decline answering it, considering equitable questions as not properly within their jurisdiction. (c) Hence the great importance of keeping in view the distinctions between legal and equitable rights, interests and estates, and legal and equitable injuries and remedies; the principal rules relating to which as regards the proper remedies will be found stated in the preceding volume. (f)

The next most important and exclusive jurisdiction is in the various instances of *injunction bills*, anticipating and preventing injuries, and either having no relation to suits or seeking to stay or modify suits in another Court. With respect to injunctions it would be desirable if Courts of Equity, or at least some Court, exercised a power not only to restrain or prevent *all* expected injuries and crimes, but which jurisdiction we have seen the Court of Chancery disclaims, (excepting merely in the protection of an infant or a libel interfering with the proceedings of the Court.) (g) On the other hand it has been a frequent observation, that this being a jurisdiction interfering with inventions beneficial to the community, ought therefore to be exercised *with great caution*, (h) and it would be desirable that some security against the injury and damages occasioned by an ultimately untenable injunction should be afforded, as a bond with sureties conditioned for the prosecuting the injunction with effect or paying all costs and a sum sufficient to cover the utmost damages; for not unfrequently it has occurred that upon a summary application for an injunction the same has been granted, and afterwards, on the hearing of the cause, been dissolved as groundless, whilst in the mean time the sale of the book or invention has been entirely suspended and become comparatively useless, and the injured party has at present no remedy. (i) Unless the infringement of a copyright or patent

(d) *Ante*, vol. i. 6 to 8, 24.

(c) *Ante*, 351, this volume.

(f) *Ante*, vol. i. 363 to 373; 2 *Mad. Ch. Pr. Index, Trusts*.

(g) *Ante*, vol. i. 697. At law, excepting in the case of a threatened battery or breach of the peace, there is no adequate preventive remedy.

(h) *Crowder v. Tinkler*, 19 *Ves.* 618.

(i) In *— v. —*, A. D. 1833, an injunction was granted to restrain the publication of a work on the Practice of

the Law, but the injunction was afterwards dissolved on hearing of the cause. In the mean time, however, such great alterations in the law had taken place that the work had become of no value *without great additional labour and expense*, and yet the author had no remedy for the injury, for no instance is known of an action on the case for an unfounded injunction obtained *ex parte*. It is submitted, that before hearing of a motion for injunction the party applying should execute a bond

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will inevitably ruin the same or the proprietor, it should suffice that *security* for accounting for and paying any damages should be given until the final hearing of the bill. So although it may be fully established that there is a complete and decided defence in equity on the merits, the Court of Equity will, at least, sometimes not grant an injunction to stay trial or proceedings at law, but on the terms of the defendant at law bringing the whole sum sued for into Court, which it may be impossible or highly prejudicial for him to do, and when it might suffice if he found reasonable *security* for the payment in case a Court of Law or Equity should ultimately decide against him. (k) The full extent of the jurisdiction by injunction has been examined in the preceding volume, and to which we must refer. (l)

The other most important branch of jurisdiction exclusively vested in the Courts of Equity is the power to decree *specific performance* of a contract, or the delivery of a specific chattel or legacy or other specific relief, and which occupied a considerable part of the preceding volume, and to which we must also refer, (m) and the practice relative to which we have also there investigated. (n)

Other peculiarities.

Other *peculiarities* in the equitable jurisdiction of the Chancellor are, as they assist a *complainant* or a *defendant at law*; thus in favour of a complainant they are, first, the compelling a defendant, in aid of a suit or proceeding in a Court of Law, upon bill filed, to *discover* or deny in particular, upon his oath, *material facts* charged in the bill to have taken place, but which the complainant might otherwise be unable to prove; a jurisdiction which does not exist at law nor in general in an Ecclesiastical Court, excepting that when a party in a Court of Law obtains a rule nisi on a summary proceeding, he thereby in effect compels the party either to shew cause or to suffer the rule to be made absolute or to disclose the facts upon which he relies by his affidavits at the risk of an indictment for perjury, either of which proceedings, if the merits be favourable to the complainant, at once may lead to the attainment of justice. But a bill in equity for a discovery is not sustainable merely in aid of the *Ecclesiastical* Court against *executors*, because the latter Court has power itself to come at the discovery without such assistance. (o)

with substantial sureties, in the nature of the bond executed by a petitioning creditor before a fiat in bankruptcy. See the observation of Sir J. Degge relative to prohibitions, *ante*, 357.

(k) *Ante*, vol. i. 709.

(l) *Ante*, vol. i. 700, 701.

(m) *Ante*, vol. i. 825 to 868.

(n) *Ante*, vol. i. 862 to 868

(o) 1 Atk. 288; Chit. Eq. Dig. Prac.

Another peculiarity is the *mode of investigating or trying facts*, viz. instead of a trial by jury the investigation proceeds upon *affidavits* or by written *depositions* in answer to *written interrogatories* administered to witnesses, and upon which the Chancellor or equity judge may, if he think fit, finally decide without the intervention of a jury; (*p*) though he may and ought, if the matter of fact continue doubtful, direct an issue to be framed and to be tried by a jury at law before a judge of one of the superior Courts. (*q*)

Another peculiarity is, that upon the hearing of a cause the Chancellor and other Courts of Equity we have seen may, in aid of his conscience, as it is termed, before decree or order, direct *a case to be stated to the judges* of one of the Courts of law upon a question of law, (*r*) or an *issue* or an *action* to ascertain a question of fact. (*s*) A Court of Equity may make *interim orders* in all cases upon affidavits, and after answer the cause may be brought to a hearing and decree, without directing an issue to be tried, except in the cases of a bill by an *heir*, and a *rector or vicar*; for in general and subject to those two exceptions, the direction of an issue by a Court of Equity is in its discretion, and its object being solely to institute further inquiry for the better information of the Court itself, the order for the trial of an issue is *ex mero motu*. (*t*)

The proceedings in Chancery and other Courts of Equity, like those at law and in other Courts, are either *formal* or *summary*, and numerous statutes expressly give summary powers. The formal suits are by filing a bill and compelling the defendant's appearance by *subpœna* to answer, (and which may be enforced by attachment for the contempt in not appearing, but which contempt may be discharged under 2 W. 4, c. 58,) and in some cases immediately after filing the bill upon proper affidavits, and before answer the complainant may move for an *injunction*. (*u*) In general the defendant *answers* the bill, and issue is then joined, and witnesses are examined, and the cause proceeds to a *hearing* and *decree*, and which, in case of non-compliance, can in general only be enforced by *attachment*,

Course of proceedings in Equity Courts are formal or summary.

Discovery; as to bills of discovery, see 1 Mad. Pr. 196 to 216; and see further as to bills of discovery, *ante*, this volume, 51.

(*p*) *Bullen v. Michel*, 2 Price, 399, 4 Dow, 318, 320, 329; but in the cases of a bill filed by an heir or a rector or vicar, the party has a right to an issue, *id*.

(*q*) *Hampson v. Hampson*, 3 Ves. & B. 42; *Chit. Eq. Dig. Jurisdiction*, v. p. 593.

(*r*) As to stating a case, *ante*, 350 to 352.

(*s*) 2 Mad. Ch. Pr. 471; *ante*, 352.

(*t*) *Bullen v. Michel*, 2 Price, 399; and *Peake v. Highfield*, 1 Russ. R. 559; 2 Mad. Ch. Pr. 471, as to the general rule and exceptions.

(*u*) *Ante*, vol. i. 700. If the defendant be attached for contempt in not appearing or other contempt and escape, an action lies against the officer. *Blower v. Hollis*, 3 Tyrw. 356.

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which occasions perpetual imprisonment unless the defendant obey, (x) or the Court should discharge him under 2 W. 4, c. 58; and in some cases a *writ of assistance*, (which is in the nature of a writ of *haberi facias possessionem at law*), may be issued to deliver the possession to the party entitled under the decree. (y) It seems that, although in strictness there must be the same certainty as to parties and number of complainants on a bill in equity as in an action at law, and all who ought must sue, and no uninterested party should be joined, or the bill will be demurrable; (z) yet in equity the consequences of omitting a necessary party are not absolutely so fatal as at law, for in equity, if an essential party who has an interest be omitted as a complainant, the objection may be cured at the hearing by the undertaking of the plaintiff to give full effect to the utmost rights which the omitted party could have claimed, provided those rights would not affect the rights or the defence of the defendant. (a)

Summary applications are usually by *motion*, supported by affidavits, and upon which both parties are heard and an *order* made; (b) but what can be done on *motion* may also be effected by *petition*. In general all applications for payment of money, or where a detailed statement is requisite to attain the object, a *petition* is preferred. All applications for special injunctions during the long vacation are made on *petition*. No original affidavit can be read in Court, but it must be previously filed, and an office copy produced in Court on the hearing of the motion or petition. When a *summary* or particular jurisdiction has been given by statute, the precise course of proceeding there directed must be pursued, the same as we have observed is essential in Courts of law. (c)

It seems that a party entitled to proceed by motion in a Court of Equity under various statutes authorizing *summary* application, is not thereby precluded from filing a bill in equity to obtain the same object, if with a view to saving *his right of appeal* or for other reasons it should be considered the more advisable course; (d) and this seems to be analogous to the decision at law, viz. that the Assessed Tax Act, 43 G. 3, c. 99, s. 36, giving an appeal to two commissioners, does not take away the

(x) *Ante*, vol. i. 865; *Blower v. Hollis*, 3 Tyrw. R. 356.

(y) *Ante*, vol. i. 865, 701.

(z) *The King of Spain v. Machado and others*, 4 Russ. R. 225, 228 to 236, 240 to 242, 562; *Harvey v. Cook*, 4 Russ. R. 34, 54, 55.

(a) *Harvey v. Cook*, 4 Russ. R. 34.

(b) 2 Mad. Ch. Pr. 580, 581; see a proceeding by *petition* and affidavit for an injunction, *ante*, vol. i. 700, 701.

(c) *Baynes v. Baynes*, 9 Ves. 462.

(d) *Wall v. Attorney-General*, 11 Price, 643.

jurisdiction of the superior Courts to try the validity of a seizure for taxes by action. (e)

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Annuity deeds.

With respect to the jurisdiction of a Court of Equity to interfere in cases of *annuities*, the 53 G. 3, c. 141, s. 1, enacts, that if there be not a proper memorial as thereby required, the deed, bond, instrument or other assurance, shall be null and void to all intents and purposes, but is silent as to the Court to be proceeded in; and the 6th section, authorizing summary proceedings, only names the Court in which the *action* is brought. But still a Court of Equity by its general jurisdiction has power to decree that annuity deeds, when void, shall be delivered up to be cancelled, and a re-conveyance executed, and therefore unless the case can be brought within the 6th section of the act, it is most advisable to resort to a Court of Equity. (f) The 5th section of the Annuity Act, 53 G. 3, c. 141, gives a judge of King's Bench or Common Pleas summary power to compel the production of the original annuity deeds and examination with a copy, but singularly no such power is extended to a baron of the Court of Exchequer or to a judge of a Court of Equity. A Court of Equity cannot on *motion* order the delivery up of an annuity deed void for omission in the memorial, but the proceeding must be by *bill* filed. (g)

As regards submissions to arbitration and awards, the jurisdiction has been altogether transferred, by the 9 & 10 W. 3, to the Court of which the submission is made a rule of Court, and awards of that nature must be regulated by that statute with respect to the period within which the application must be made to set them aside, and it rather seems that a case of fraud does not, even in a Court of Equity, constitute any exception; (k) and there is no jurisdiction in equity by injunction to stay proceedings at law upon an award made under a rule of a common law Court under the statute 9 & 10 W. 3, c. 15. (l) Although the statute speaks only of Courts of *Record*, and the Court of Chancery, as regards its equitable jurisdiction, is not a Court of Record, yet it is clear that a submission to arbitration may be made an order of a Court of Equity, and the award enforced by attachment or set aside precisely as in one of the superior Courts of Law. (m)

Arbitrations
and awards. (i)

(e) *Earl Shaftesbury v. Russell*, 1 B. & C. 666; 3 Dowl. & Ry. 84.

(f) *Holbrooke v. Sharpley*, 19 Ves. 131; 10 Ves. 218; *Dupuis v. Edwards*, 18 Ves. 358; *Ware v. Horwood*, 14 Ves. 23; 10 Ves. 200; *ante*, vol. i. 710; and Chit. Eq. Dig. tit. Annuity; *ante*, 331.

(g) *Ibid*.

(i) See in general, *ante*, 124; 2 Mad. Ch. Pr. 712; Chit. Eq. Dig. tit. Arbitrator.

(k) *Auriol v. Smith*, 1 Turn. & Russ. 126.

(l) *Guinnett v. Bannister*, 14 Ves. 530.

(m) *Ante*, this vol. p. 124, and 2 Mad. Ch. Pr. 712.

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diction over
solicitors. (n)

Upon principle it would seem that the Court of Chancery or the equity side of the Exchequer must have an *equal summary jurisdiction* over solicitors as we have seen Courts of Law have, and would proceed on the same principle in the exercise of such jurisdiction. We have, in the early part of this volume, considered the professional education, qualifications, admission, duties, rights and privileges of attornies and solicitors. (o) We have also stated the cases in which a Court of *Law* will interfere summarily against an attorney for *misconduct*, although they will not for mere negligence, but in the latter case leave the client to his remedy by action; (o) and that as regards the jurisdiction to tax costs at common law, independently of the statute 2 G. 2, c. 23, the decisions at law are discordant. (p) The decisions and rules in equity respecting *solicitors* are nearly to the same effect. (q) The Court of Chancery will compel a solicitor to deliver his bill of costs and deeds and papers, although there be no cause depending. (r) So they have jurisdiction to prevent a solicitor from abusing the confidence reposed in him and prevent him from acting against his former client in a matter where, in consequence of his prior employment, he acquired information which he would use against him; (s) and if a solicitor has been guilty of malpractice in bankruptcy, the motion to strike him off the rolls may be made to the Court of Chancery, though not in the matter of the bankruptcy. (t) So if a solicitor falsely represent that an injunction has been obtained, he may be struck off the rolls; (u) and if a solicitor assist his client in obtaining a fraudulent release, he may be properly made a party in a suit to defeat it. (v)

It is stated in one case that a solicitor was fined 20*l.* for forging counsel's name to a scandalous answer, (y) and that upon an attorney or solicitor appearing to have been guilty of gross neglect, the Court will order him to pay the costs. (z) And although in one case the Court is reported to have granted an attachment against a solicitor for negligence; (a) yet in a very recent case, the Vice-Chancellor refused to entertain a petition by a client against his solicitor even for gross negligence in

(n) See in general, *ante*, this volume, 1 to 45, 47 to 71, 339, 340; Chit. Eq. Dig. tit. Solicitor; Smith's Ch. Pr. 528 to 533, &c.

(o) *Ante*, 338 to 340.

(p) *Ante*, 340. It seems also unsettled in equity, Beames, 255, 256; Smith's Ch. Pr. 537.

(q) See Smith's Ch. Pr. 533.

(r) *In re Murray*, 1 Russ. 519; *Ex parte Earl Uxbridge*, 6 Ves. 425.

(s) *Ante*, vol. i. 705; and *Grissell v. Peto*, 9 Bing. 1; *Earl Cholmondeston v. Lord Clinton*, Coop. 80.

(t) *Ex parte Lowe*, 1 Gl. & J. 78.

(u) *Kimpton v. Eve*, 2 Ves. & B. 352.

(v) *Bowles v. Stewart*, 1 Schol. & L. 227.

(y) *Whitlock v. Marriot*, Dick. 16.

(z) *Fawkes v. Pratt*, 1 P. Wms. 593.

(a) *Flood v. Mangle*, 3 Atk. 568; Dick. 129.

suffering a bill to be dismissed with costs, but left the client to bring his action at law if so advised. (b)

So the Court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, unconnected with any pending suit, as given by him at the sale of an estate to do certain acts for clearing the title; (c) though a solicitor has been ordered to pay all the costs occasioned by his refusing to appear for a defendant at the hearing, pursuant to his undertaking, and the costs of the application, because the latter was given in connection with a suit. (d)

With respect to a *solicitor's costs*, it seems to have been the opinion of Mr. Beames, in his *Treatise on Costs*, that the Chancellor has summary jurisdiction to order his bill for costs incurred in that Court to be taxed independently of the enactment in 2 G. 2, c. 23, s. 23; (e) but as the decisions at law upon that point are contradictory, this question cannot be considered settled. (f)

The Court of Chancery we have seen has not, or at least *will not exercise directly any criminal jurisdiction* even to prevent, much less to punish crime, (g) unless perhaps to protect an infant, (h) or where a party is vexatiously proceeding as well in equity as criminally, in which case he may be compelled to elect and abandon one; (i) and this Court has no cognizance of a libel, unless it constitute a libel upon or abuse of proceedings depending in that Court or the suitors; (k) and this Court will not compel a discovery in aid of criminal proceedings. (l) But although a Court of Equity has no general jurisdiction to enjoin or regulate proceedings upon indictments, yet circumstances may give it, as where prosecuted by relators in an information or plaintiffs in a suit in equity, they are subject to controul by order personally affecting them, but not the defendants. (m) Nor has the Court any jurisdiction over matters of *prize*, unless there be a trust; (n) nor as a Court of appeal from the decisions either of the Privy Council or the commissioners under the acts and conventions for indemnifying British subjects from the confiscation of their property by the French

When the Court of Chancery has no jurisdiction or will not exercise it.

Not to prevent crimes.

(b) *Frankland v. Lucas*, 12 Nov. 1831, Smith's Ch. Pr. 533.

(c) *Pearl v. Bushell*, 2 Sim. 38.

(d) *Cook v. Broomhead*, 16 Ves. 133.

(e) Beames on Costs, 255, 256, 262; Smith's Ch. Pr. 537.

(f) *Ante*, 340.

(g) *Ante*, vol. i. 697 to 700.

(h) *Ante*, vol. i. 697 to 699; 2 Swanst. 413.

(i) *Ante*, vol. i. 699, 700; 18 Ves. 220.

(k) 2 Atk. 469; *ante*, vol. i.

(l) *Ante*, vol. i. 700, 703; 2 Ves. 398.

(m) 18 Ves. 220.

(n) *Ante*, vol. i. 813; 2 Mad. Ch. Pr. 238; *Parker v. Toulmins*, 1 Cox, 265.

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revolutionary government, (o) unless in case of a trust. (p) Nor will a Court of Equity entertain a bill to rescind the orders of the Court of Exchequer, as a Court of Revenue, nor interfere in a matter which the Exchequer, as a Court of Revenue, was competent to decide. (q)

When *commissioners* or persons (as under the Acts for redemption and sale of the Land Tax, 42 G. 3, c. 116, s. 154,) act merely ministerially, there is consequently no remedy against them in a Court of Equity, but only either by mandamus in the King's Bench (which is doubtful, unless to compel them to grant certificates to persons proposing to purchase,) or a suit in the Exchequer, in such cases as are specially provided for by the act; (r) and when there is a preferable remedy at law by mandamus or quo warranto, this Court will not interfere. (s)

When not over
marriages. (t)

The *Spiritual Court* has exclusive cognizance of the rights and duties arising from the *marriage* state, and Courts of Equity, therefore, have no jurisdiction upon a contract for separation; (u) and though a Court of Equity has jurisdiction to decree the specific performance of an agreement between husband and wife for a separation and separate maintenance, (x) yet the *legality of marriage* cannot be determined in a Court of Equity, especially after sentence in the Spiritual Court, in causa jactitationis matrimonii; and this, although the proceedings there were only a feint and collusive; (y) and the fact of a marriage, if charged in a bill in equity, and denied by the answer, there being evidence in the cause, must be tried at law by a jury. (z) But equity has incidentally jurisdiction, as where a *trust* has been created; and therefore though a Court of Equity has no immediate jurisdiction over a contract for separation, yet it has where a third person has covenanted to indemnify the husband against the wife's debts, or where a fortune accrues to the wife after separation. (a) So a Court of Equity will in some cases decree a wife alimony, though she have a sentence for it in a Spiritual Court, (b) and the Court of Chancery and the Master of the Rolls or Vice-Chancellor may secure the payment of alimony allowed by the Ecclesiastical Court by ne exeat; (c) but in general equity will not decree alimony, except where there has

(d) *Hill v. Reardon*, 2 Sim. & Stu. 431.

(p) 2 Russ. 608; ante, vol. i. 818.

(q) *Dillon v. Buxton*, 3 Ridg. P. C. 80; post, 435, 454.

(r) *Williams v. Stead*, 3 Meriv. 472.

(s) *Attorney-General v. Reynolds*, 1 Eq. Ab. 181; ante, 379, 380; post, 437, n. (m).

(t) See in general Chit. Eq. Dig. tit. Jurisdiction, vii. p. 398.

(u) *Legard v. Johnson*, 3 Ves. 352.

(x) *Fletcher v. Fletcher*, 2 Cox, 99.

(y) *Hatfield v. Hatfield*, 5 Bro. P. C. 100; 3 Ves. 352; Chit. Eq. Dig. vol. i. 598, where see exceptions.

(z) *Revil v. Fox*, 9 Ves. 269.

(a) *Supra*, note (y).

(b) *Angier v. Angier*, Pre. Chan. 496; Gilb. Eq. R. 152.

(c) *Ante*, vol. i. 751 to 733; 3 Atk. 295; 11 Ves. 526.

been an agreement between the parties. (*d*) Where a ward of the Court has been married, if the Master should report that the marriage was invalid, a second marriage may be ordered by the Court, (*e*) although the statutes 58 G. 3, c. 81, and 4 G. 4, c. 76, s. 27, prohibit any suit in an Ecclesiastical Court to compel marriage.

There are cases in which a Court of Equity have decreed *alimony* to the wife; but it should seem that equity has no proper jurisdiction over the subject, except upon an *agreement* between the parties. (*g*) However, we have seen that in some cases equity will, by writ *ne exeat regno*, restrain the husband from quitting the kingdom to evade payment of an agreed or decreed allowance. (*h*) In other cases *alimony* should be proceeded for in an Ecclesiastical Court. (*i*)

Nor has this Court any jurisdiction to determine on the *validity* of a *will*, either of real or personal property, on the ground of *fraud*, or otherwise; the validity of a devise of *real property* must be determined by a jury, and the validity of a will of personalty can be decided upon only in the Ecclesiastical Courts. (*k*) But pending litigation in the Ecclesiastical Court, a bill for an account and receiver is sustainable. (*l*) If a probate be obtained by *fraud*, (over which peculiarly Chancery has cognizance,) then that Court may interfere by injunction, &c. (*m*) Where the question in the cause appeared to be between persons in their ecclesiastical capacity, Chancery will not interfere, but leave it to the Ecclesiastical Court, as being the proper tribunal to determine it. (*n*) But *mistakes*, apparently on the face of a will, may be rectified in equity, (*o*) and ambiguities in technical terms may be explained by parol evidence of scientific persons; (*p*) and Courts of Equity have exclusive jurisdiction over a devise of *real estate* to pay debts. (*q*)

(*d*) 1 Foub. Eq. 105; 1 Ch. Rep. 24, 87, 99, 118; 1 Chas. Cas. 150; 2 Atk. 96; 3 Atk. 548; 2 Vern. 386, 761; 3 Bro. Ch. R. 614; *post*, *Alimony*.

(*e*) 8 Ves. 74; 8 Com. Dig. 1035; and see 1 Mad. Ch. Pr. 347, as to the jurisdiction of the Court of Chancery over its wards.

(*f*) When the Court of Chancery will decree allowance in nature of *alimony*, &c. Chit. Eq. Dig. Husband and Wife, 522.

(*g*) 1 Foub. Eq. 205; 1 Chan. R. 24, 87, 99, 118, 150; 2 Atk. 196; 3 Atk. 548; 2 Vern. 386, 761, 752; 3 Bro. Ch. R. 604; Lit. R. 78; Wood's Inst. 62; *Angier v. Angier*, Prec. Ch. 496; Gilb. Eq. R. 152.

(*h*) 3 Atk. 295; Dick. 143; *supra*, 434; *ante*, vol. i. 732; but see 1 Ves. 94; 11 Ves. 526.

(*i*) *Post*, *Ecclesiastical Courts*.

(*k*) *Warwick v. Gerrard*, 2 Vern. 8, 76; *Jones v. Jones*, 3 Meriv. 2; *Pemberton v. Pemberton*, 13 Ves. 297; 1 Chit. Eq. Dig. 597.

(*l*) *Atkinson v. Hensham*, 2 Vesp. & B. 85; *Ball v. Oliver*, *id.* 96.

(*m*) *Barnesley v. Pouett*, 1 Ves. 287.

(*n*) *Clare Hall v. Orwin*, Dick. 457.

(*o*) 1 Mad. Ch. Pr. 80 to 85; 1 Swanst. 28; 5 Mad. 202, 216, 451.

(*p*) *Ante*, vol. i. 112.

(*q*) *Barker v. May*, 9 Barn. & Cres. 189.

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Not if the remedy be at law, &c., unless Equity has a concurrent and equal jurisdiction.

Bills and suits by *legatees* have already been adverted to, (r) and the remedy in the Ecclesiastical Court will presently be fully stated.

If it appear upon the face of a bill filed that the *complainant's right* as well as remedy are only *legal* or cognizable *only* in a Court of *Law* or Admiralty, or a Court of Prize, and not remediable in the Court of Equity, then the latter Court *has no jurisdiction*, and the defendant may demur to the bill; (s) and no suit lies in equity for a sum of money certain and recognized to be due or agreed to be paid by contract, especially when by specialty; (t) nor can a bill be filed in any respect to enforce a personal contract, excepting in a few cases noticed in the previous volume, or merely for discovery of evidence in aid of an action at law, and not praying relief. (u) Nor is a bill sustainable for mesne profits, or for compensation for waste recoverable at law, unless there was some impediment, as infancy; (x) and we have seen that an heir cannot sustain a bill to recover the possession of an estate or title deeds, though he may in certain cases for a discovery merely in aid of proceedings at law; (y) and in one case, upon a bill having been filed in equity, for payment of a promissory note, which was not originally negotiable, and which had been cut in half and one part lost, and the bill tendered an indemnity, the Master of the Rolls seemed to think "that the plaintiff might recover at law, and therefore he was afraid of breaking in upon the rules established as to the jurisdiction of the Courts, that where a party can recover at law, he ought not to come into equity;" (z) and although a Court of Equity will on bill filed set aside or restrain a debtor from pleading or using a release obtained by undue means, yet it will not decree payment of the legal debt upon such a bill. (a) A Court of Equity cannot in general relieve by decreeing compensation for nonperformance of an agreement or contract merely relating to personalty, and such damages must be proceeded for at law; (b) and where a bill was filed to recover money upon a policy of insurance, the defendant demurred, because the remedy was only at law. (c) There are,

(r) *Ante*, 424, 425; Chit. Eq. Dig. Jurisdiction, 597.

(s) *Hawshaw v. Parkins*, 2 Swanst. 546; 2 Mad. C. P. 170, 171, 288; *Campbell v. French*, 2 Cox, 366; *French v. Connolly*, 2 Anst. 454; Cary's Rep. 15, 20.

(t) *Holles v. Carr*, 3 Swanst. 644; *ante*, vol. i. 858.

(u) *Ante*, vol. i. 850 to 860.

(x) 6 Ves. 88; *aliter*, if equitable waste, 1 Mad. 116.

(y) *Ante*, 54; *Crow v. Tyrrell*, 3 Mad. R. 182.

(z) *Mossop v. Eadon*, 16 Ves. 430; In *Hansard v. Robinson*, 7 Barn. & Cres. 90; and *Macartney v. Graham*, 2 Simon's R. 285; *Mossop v. Eadon* appears to have been doubted; but it will be found well decided, because as the lost note was not negotiable, no third person could have sued upon the same, and therefore the remedy was at law.

(a) *Pascoe v. Pascoe*, 2 Cox, 109.

(b) *Clinan v. Cooke*, 1 Sch. & Lef. 25.

(c) *Chekuff v. London Assurance Company*, 4 Bro. P. C. 436.

however, a few exceptions. (*d*) And where a Court of Equity has *concurrent* and equal jurisdiction, a bill there may be sustained. (*e*) And although there might originally have been an objection to a bill filed in a Court of Equity for want of jurisdiction, and the matter might be properly triable at law, yet the defendant, by filing a cross bill, may give the Court jurisdiction. (*f*) And when it is doubtful whether the Court of Equity has jurisdiction, the Court will not try the point on a demurrer. (*g*)

There are also cases of a defendant sued at law, where, although the facts might equally afford a *defence* at law, yet he might file a bill in equity for relief. (*h*) As where a defendant at law has accepted a bill for the accommodation of the plaintiff; (*i*) but where an injunction is prayed against proceedings at law on that ground, the Court of Equity may require the defendant at law to bring the alleged debt into the Court of Equity, until the hearing of the cause, when, if a perpetual injunction be granted, the money will be refunded, with any interest made in the mean time. (*k*)

If the Court of Equity have concurrent jurisdiction, then it would be improper to demur to the bill; and where a bill was filed for relief against an order of the commissioners of sewers, and the defendant demurred on the ground of want of jurisdiction, such demurrer was overruled. (*l*) But an injunction against the act of commissioners of sewers reducing the height of water in a river, was dissolved, there being a much shorter remedy by certiorari in the Court of King's Bench, who interfere with great caution. (*m*).

In some of the cases of jurisdiction alluded to, especially whenever the interest in real or personal property is merely *equitable*, the Court of Equity has either exclusive or concurrent or preferable jurisdiction to that of a Court of Law. In the case of a lost deed, although it was formerly supposed to be otherwise, (*n*) it is now settled that an action at law is

When the remedy at law or in equity is concurrent, which is preferable.

(*d*) *Ante*, vol. i. 850 to 860; and in case of a lost bill, payment may be decreed, *ante*, 404, note (*d*).

(*e*) Same case as in note (*s*), preceding page; and see *infra*, note (*m*) (*n*).

(*f*) 2 Mad. Ch. Pr. 288; *Burgess v. Whealc*, Eden, 190.

(*g*) *O'Brien v. Irwin*, 1 Ridg. L. & S. 361; *Weymouth v. Boyer*, 1 Ves. jun. 416.

(*h*) 7 Ves. 249.

(*i*) ——— *v. Adams*, Young's Eq. Exchequer Reports, 117; *Sparrow v.*

Chisman, 9 Barn. & Cres. 241; *ante*, vol. i. 706, note (*x*); but see considerations essential before applying to a Court of Equity, *id* 709.

(*k*) *Id. ib.* and *ante*, vol. i. 709.

(*l*) *Box v. Allen*, Dick. 49.

(*m*) *Kerrison v. Sparrow*, 19 Ves. 449; *ante*, 434, note (*s*).

(*n*) *Toulmin v. Price*, 5 Ves. 238; 2 Madd. Chan. Pr. 170; 7 Ves. 19; 9 Ves. 466.

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sustainable, the declaration averring the destruction or loss as an excuse for a profert; and in general an action at law is preferable, as most expeditious. *(l)* But there are exceptions. *(m)* And if a *negociable* bill or note be lost, no action at law is sustainable, and the remedy must be by bill, after tendering an adequate indemnity; *(n)* and the defendant may file a bill to restrain the action at law when the instrument was negociable. *(o)*

In matters of account, also, as between mortgagor and mortgagee, the former has in some cases a summary remedy at law by express statute; *(p)* and a principal may sue his agent at law for not accounting, or may proceed in equity. *(q)* *Partners* in general must* proceed against each other in equity, or by action of account, unless there has been an admitted balance in favour of one, *(r)* or an express covenant to account and pay, *(s)* and in lieu of a bill in Chancery or the Exchequer, to account for the value of tithe, the tithe owner may, as we have seen in the case of predial tithe, sustain an action of debt for treble the value of the tithe the defendant ought to have set out. *(t)* When the contest relative to tithe is with many inhabitants, then a bill is preferable to an action; but in case of a single individual refusing to set out tithe, an action at law may be preferable, but still depending on other facts. When the debt for tithe is under £20, a suit in the Ecclesiastical Court for subtraction of tithe may be preferable, because the defendant cannot be discharged from imprisonment without payment. *(u)* When fraud can be proved at law, it is equally available there as a *defence* against a deed or contract as in equity; *(v)* but if the fraud cannot be established without the assistance of a bill for a discovery and the defendant's answer, then a bill should be filed; and although in general a person is not bound to answer a bill subjecting him to a penalty, it is otherwise by express enactment in some cases, as in gaming *(y)* and stock-jobbing transactions, *(z)* when the party is obliged to answer a bill of the party aggrieved, though not that of an

(l) *Read v. Brookman*, 3 T. R. 151; 2 Madd. Chan. Pr. 170.

(m) *East India Company v. Boddam*, 9 Ves. 464; *East India Company v. Donald*, *id.* 275.

(n) *Hansard v. Robinson*, 7 B. & C. 90.

(o) *Davies v. Dodd*, 4 Price, 176, when not, *Mossop v. Eadon*, 16 Ves. 430.

(p) *Ante*, 331.

(q) 5 Taunt. 431; 1 Marsh. 115; 2 Camp. 238; Eq. Cas. Ab. 5; 7 Ves.

588; 2 Young & J. 33.

(r) 2 T. R. 478; 2 Bing. 170; 3 Bing. 55; 6 B. & C. 368; 1 Stark. 78; *ante*, vol. i. 869, 870.

(s) 13 East, 8; 2 T. R. 538, 482.

(t) *Ante*, vol. i. 218 to 221, 398.

(u) *Ex parte Kaye*, 1 B. & Adol. 652.

(x) Per Ashhurst, J. in *Cockshott v. Bennett*, 2 T. R. 763.

(y) 9 Anne, c. 14, s. 3.

(z) 7 G. 2, c. 8, s. 2.

informer. (a) There is also in general no remedy at law for a *legacy*, but a suit must be commenced either in a Spiritual Court or in equity. In general, when the legacy is of considerable value, it is preferable to proceed in the latter Court, because there the fund may be secured in Court; (b) but when the legacy is small, it may be readily recovered in the Ecclesiastical Court. (c)

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Another rule is, that when the claim is *so small* as not to justify in prudence the expenses of proceeding in a Court of Equity, it will not, in mercy to the claimant, interfere or permit a suit, or otherwise afford relief, the matter being *infra dignitatem*, to which rule, however, we have seen there are some exceptions. (d) A bill of interpleader, where the sum in dispute is under £10, cannot be sustained. (e) Certainly for a small legacy or claim much under £100, it is not worth while to file a bill in Chancery, unless where it is certain that there is an adequate fund, and the costs of the suit will be decreed to be paid out of such fund. In the case of a small legacy, we shall find that the best remedy is in the Court of Arches. (f) It would be well if the legislature would constitute some adequate Court for the recovery of small equitable claims, and perhaps a measure similar to that forming part of the proposed Local Court bill would be salutary.

Not when the claim is so small as to be *infra dignitatem* to afford relief.

It must have been observed, that the usual arrangement of the subjects of the jurisdiction of the Chancellor and his Court of Chancery, is by no means analytical or clear, and unquestionably the particulars of such jurisdiction would have been better arranged under two principal heads, as *first*, in favour of creditors and claimants who seek to *establish* some claim; and *secondly*, on behalf of parties who seek to *resist* some present or future claim.

Summary of the equitable jurisdiction of Court of Chancery.

On the part of the *former* are all those bills and proceedings which seek immediately to litigate and establish a claim, or to prevent it from being incumbered hereafter with difficulty. Of this description are all bills by a *cestui que trust* against his trustee, where the claimant having only an *equitable* right or interest, he could not in his own name sue at law; as where a bond or other contract has been executed to A. to pay money to him,

(a) *Thistlewood v. Cracroft*, 1 Marsh. 497; 6 Taunt. 141; M'Clel. R. 185; *Billing v. Pulley*, 2 Marsh. 125; *Rawlings v. Hall*, 1 C. & P. 11, 325.

(b) *Sharples v. Sharples*, M'Clel. R. 506; ante, vol. i. 551, 716.

(c) *Post*, 467, and n. *Ecclesiastical Courts*.

(d) See the rule and exceptions, ante, vol. i. 823.

(e) *Ante*, 418; *Smith v. Target*, 2 Aust. 530.

(f) *Post*, 467, and n.

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or perform some act in trust for the benefit of B., and when in consequence of A. neglecting to act, B., the cestui que trust, is or may be prejudiced, and in which case, as he could not *at law* sue either his own trustee, or proceed against the third party who contracted to pay or to perform, his only remedy, after formal and proper request to A. to act, and B. to pay or perform, is only by bill in equity, because in general the discretion to act having been vested in A. as a trustee, he is not liable to be sued at law, or even in equity, unless it can be shewn, that under the circumstances A., the trustee, ought to have acted, and enforced the performance by B. The same principle equally applies to trustees of *real* property; and before filing a bill in either case, care should be observed to adopt so clear a line of courteous conduct towards the trustee, as to ensure the approbation of a Court of Equity in favour of the cestui que trust.

There are also cases where, although a complainant may be confident that the legal interest in real property is *primâ facie* vested in him, so as to enable him on his own demise to sustain an action of ejectment, but yet there may be reason to fear that some term for years is outstanding, although satisfied and attending the inheritance, but which if proved on the trial might cause a nonsuit, though as neither the lessor of the plaintiff nor the defendant beneficially claimed against the termor, it would be unjust to bring it forward so as to prevent the trial and decision upon the *substantial right and real merits*; in such a case a bill may be filed and decree obtained, preventing the party in possession from setting up or availing himself of such terms as a ground of nonsuit. (*f*) Still more, if a complainant apprehended that the party in possession has in his custody title-deeds or documents that might embarrass the trial, he may file a bill stating his own title or claim as heir, and pray a discovery of writings alleged to be in the possession or power of the defendant. (*g*)

Again, if a party beneficially entitled under a contract discover some defect therein, in consequence of the same not having been prepared or executed according to the real intention of the parties, he may, in order afterwards to enforce his demand at law corresponding with the real intention, file a bill to compel the contracting party to execute a proper deed or security, and this even against a surety; (*h*) or if he agreed to

(*f*) 1 Madd. Chan. Pr. 201, 259.
(*g*) *Ibid.* 200.

(*h*) *Ante*, vol. i. 710, 711.

give a *sufficient* bill or note, and contrived to deliver one on an insufficient stamp, he might be compelled to execute a perfect and binding security.⁽ⁱ⁾ And in the instance of the loss of a negotiable security, the creditor may, after request and offer of a reasonable indemnity, compel the party to execute a fresh security, or rather to pay when the security is already over-due.^(k) So if the contract were to convey an estate, or perform some other act which might still be specifically performed, and where the breach of contract cannot be so well compensated by the payment of damages, then, subject to a certain judicious exception, the claimant may file a bill in equity, and compel the actual performance of the act stipulated to be done, and which being usually the sale or purchase of some *real* property, would occasion permanent and continuing loss, unless performed in its very terms. To these may be added all bills to *prevent* loss, waste or injury, to which we have already referred.

On behalf of a *defendant* or person, on whom a claim is made, and who insists he has *equitable* ground for resisting it, are the various cases of *accident*, *mistake*, or *fraud* stated in a bill, and introduced upon as a ground either for obtaining an *injunction against negotiating*, or a *decree for delivering up the security* obtained by unjust or illegal means. So a person himself claiming no interest, or at most a lien which must at all events be satisfied, may, if there be several claimants of the same chattels, money or debt, file a bill of *interpleader*. Bills of injunctions to *restrain proceedings at law* are exceedingly frequent, and operate not as a *prohibition* to the Court of Law, or Ecclesiastical Court, but merely control the *party* from proceeding therein. In those cases the Court of Chancery does not dispute the *jurisdiction* of the other Court, but proceeds upon the ground that the party suing has made an *improper use of the jurisdiction*, contrary to equity and conscience.^(l)

Bills to ascertain boundaries, to perpetuate testimony, and for discovery, or for a commission to examine witnesses on interrogatories, may be obtained by *either* litigating party.

Anciently the Chancellor exercised all these and other different branches of jurisdiction in person, as he still may do; but towards the end of the last century, and in the present, it was found that the great pressure of business, and the number of

The Chancellor, how relieved from the pressure of some of these several branches of jurisdiction, and the same delegated to other Courts or officers.

(i) *Ante*, vol. i. 710, 711.
(k) *Ante*, 404.

(l) *Hill v. Turner*, 1 Atk. 516, 630;
1 Madd. Ch. Pr. 130.

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appeals, as well in his own Court as at the House of Lords, rendered it difficult, if not impracticable for him to attend to all, at least without occasioning great delay; and therefore the Court and jurisdiction of the Vice-Chancellor was created by the 53 Geo. 3, c. 24. And the equity jurisdiction of the Court of Exchequer was with the same object enlarged by the 57 G. 3, c. 18, and 3 & 4 W. 4, c. 41, ss. 25 and 27; and the Bankruptcy Court and Court of Review were established by 1 & 2 W. 4, c. 56, for the very purpose of relieving the Chancellor from the direct pressure of bankruptcy petitions; and the 3 & 4 W. 4, c. 94, sect. 24, authorizes and requires every *future* Master of the Rolls (or the present if he think fit) to give directions for that purpose, to hear motions, pleas, and demurrers in his Court, as hereafter are more fully stated, being an extension of his previous practice. And the 13th section of the same statute relieves the Court of Chancery of a burthensome part of its more ordinary business, by enacting that the Masters in ordinary of the Court of Chancery shall hear and determine all applications for time to plead, answer, or demur, and for leave to amend bills, and for enlarging publications and all such other matters relating to the conduct of suits in the said Court, as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and the Vice-Chancellor, or one of them, shall by any general order or orders direct; but enables either party to appeal by motion from the order made on such application to the Lord Chancellor, Master of the Rolls, or Vice-Chancellor. (m)

By these several modern enactments, the Chancellor has been greatly relieved from some of the burthens of his office, and enabled better to attend the more important branches of his jurisdiction, and now it is seldom that the Chancellor hears *original* causes.

- In order that the business of the Court may not be interrupted by the absence of the Lord Chancellor from illness or other cause, there is a commission addressed to the puisne judges and the then masters, authorizing any three of them, of whom a judge is to be one, to transact the business of the Court. When the business of the Court is despatched under the authority of this commission, it is transacted by one judge and two masters, who sit with the judge, join in making the orders, and constitute a necessary part of the Court. Be-

(m) It will be observed that this enactment is somewhat analogous to that in 1 W. 4, c. 70, sect. 1, enabling one of the

five judges of the Courts of law to set apart and decide upon certain inferior descriptions of business.

sides this provision, which only applies in case of the absence of the Chancellor, he is entitled to call to his assistance on the bench any of the judges, as he shall think proper, (n) and which jurisdiction the Chancellor frequently exercises, as on appeals from the Master of the Rolls or the Vice-Chancellor, especially when any difficulty is apprehended. (o)

In general, the above observations respecting the equity jurisdiction of the Court of Chancery, equally apply to the equity side of the Exchequer and all other Courts of Equity. And whatever difference there may be in the forms of practice, the same has arisen from the different constitution of their offices, so much so, that it has been observed, that if they differ in any thing more essential, one of them must certainly be wrong, because truth and justice are always uniform, and ought equally to be adopted by them all. (p)

The jurisdiction and proceedings in all Courts of Equity in general the same.

It will be remembered that we are now only examining the *jurisdiction* of the Court of Chancery. The *practice*, modified and improved by the several acts, 1 W. 4, c. 36, & c. 60, 2 & 3 W. 4, c. 50, and 3 & 4 W. 4, c. 84, & c. 94, will be fully considered after examining that of the Superior Courts of Law. From decrees and decisions in the Court of Chancery, an appeal lies direct to the House of Lords. (q)

SECT. VII.—Of the Master of the Rolls.

In relief of a part of the burthensome jurisdiction of the Chancellor, the *Master of the Rolls* has his Court called "*The Rolls*," in which he exercises a very ancient and important jurisdiction, but the actual extent of which, in the early part of the last century, gave rise to much discussion; and several controversial works were published on the occasion. (s) Mr. Maddocks, in his *Chancery Practice*, observes, that the better opinion is, that the Master of the Rolls had *no original jurisdiction* respecting matters arising in the *common law* side

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The Master of the Rolls, and his Court and jurisdiction. (r)

(n) See 1 Newl. Chanc. Prac. 3.

(o) Recently, i. e. 26th June, 1834, in *Attorney-General v. Shore*, in Court of Chancery, on an appeal from the Vice-Chancellor's decision, the Lord Chancellor was assisted by Mr. Baron James Parke and Mr. Justice Littledale.

(p) 3 Bla. Com. 429.

(q) Com. Dig. Parliament, L. 7. *

(r) Com. Dig. Chancery, B. 4, and *id.* Appendix; Vin. Ab. tit. Master of the Rolls; Sir Joseph Jekyl's *Treatise on the Office of the Master of the Rolls*, and other works referred to, *infra*.

(s) See "A Discourse of the Judicial Authority belonging to the Master of the Rolls in the High Court of Chancery,

2d edit. A. D. 1728," supposed to have been composed by Mr. York, afterwards Lord Hardwicke, 1 Madd. Ch. Pr. 21. And see "The Legal Court of Judicature in Chancery." The author of the first work contends, in 2d edit. page 9, that the Master of the Rolls always had jurisdiction on the common law side of the Court of Chancery, by virtue of his office, and that he exercised judicial authority on the equity side, independently of any special commission. The student, who intends to practise in equity, would do well to peruse those two works, which contain much information and probably occasioned the stat. 3 G. 2, c. 30.

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of the Court of Chancery. (t) Cardinal Wolsey, it is said, first introduced the practice and jurisdiction of the Master of the Rolls in hearing and determining causes in the absence of the Chancellor. (u) It was afterwards contended that the Master of the Rolls had no judicial authority *virtute officii*, but only by virtue of a special and expressly delegated particular power. (u)

The jurisdiction
of the Master of
the Rolls
settled by
3 G. 2, c. 30.

The statute 3 G. 2, c. 30, appears to have been expressly enacted to remove all doubt, and in a degree to fix the limits and qualify this jurisdiction. The act is entitled, "An Act to put an end to certain Disputes touching Orders and Decrees made in the Court of Chancery." And after reciting that "Whereas divers questions and disputes having arisen touching the authority of the Master of the Rolls in the High Court of Chancery, for putting an end to all disputes concerning the same," enacts, "That *all orders and decrees, made by the Master of the Rolls (except orders and decrees of such nature as, according to the course of the Court, ought only to be made by the Lord Chancellor, Lord Keeper, or Lords Commissioners,) shall be deemed valid orders and decrees of the Court of Chancery, subject nevertheless to be altered by the Lord Chancellor, &c. and so as no such orders or decrees be enrolled till the same are signed by the Lord Chancellor,*" &c. The Master of the Rolls has therefore precisely the same original jurisdiction as the Chancellor, *except in cases where, by the antecedent course of practice, the Lord Chancellor himself must have personally acted.* And the statute also renders it essential that the *Chancellor should sign* the orders and decrees of the Master of the Rolls to give them complete efficacy.

The Court and
jurisdiction of
the Master of
the Rolls. (v)

The time and place of the Master of the Rolls holding his Court was formerly at six o'clock in the evening, at his own house in the Rolls Yard. But the present Master of the Rolls altered those hours of sitting, and now sits *in the morning* as the other judges do; *in term time* at Westminster, and in *vacation* at the Rolls, and usually from eleven till four in the afternoon. All decrees made by him must be signed by the Lord Chancellor before they are enrolled. (y) He takes an oath prescribed by 18 Edw. 2, and holds his office for life with a salary now of 7,000*l.* a year. (z) He takes precedence next to the Chancellor and before the Vice-Chancellor (a) and all

(t) 1 Madd. Ch. Pr. 21, 22; and see *Lloyd v. Scott*, 2 Dick. 576.

(u) Wynn's Prac. Reg. 278; Com. Dig. Chancery, B. 4; Vin. Ab. tit. Master of the Rolls.

(z) See in general Com Dig. Chancery, B. 4; Vin. Ab. tit. Master of the

Rolls; Sir Joseph Jekyl's Treatise on the Office of the Master of the Rolls, and the treatises referred to, ante, 443, note (s).

(y) 3 G. 2, c. 30, s. 1.

(z) 23 G. 2, c. 25, s. 6; 6 G. 4, c. 84.

(a) 53 G. 3, c. 24.

other of the judges. The Master of the Rolls has jurisdiction to direct the issuing of a writ *ne exeat regno*. (b) He may state and send a case for the opinion of the judges of a Court of law, as to either the King's Bench or Common Pleas, (c) though formerly it was supposed that he could only do so when sitting for the Chancellor; (d) but in neither case can questions be asked upon facts stated, as a trust, or a mere question of equitable jurisdiction; and if a case should be so defectively stated, the judges may decline answering the same. (e)

The Master of the Rolls may discharge an order made by the Chancellor *ex parte*, or on motion of course. (f) From his decree in the capacity of Master of the Rolls, there lies an appeal to the Chancellor in his Court. (g) But an appeal does not lie from the Rolls to the House of Lords, until the decree has been signed and enrolled; (h) and indeed the 3 G. 2, c. 30, appears imperatively to require such signature before enrollment of the Master's decree.

Under the excepting words of the 3 G. 2, c. 30, the Master of the Rolls had no jurisdiction in lunacy or bankruptcy, (i) and subpœnas returnable immediately were also within the exception. (k) But the recent bankrupt act, 1 & 2 W. 4, c. 56, s. 12, expressly authorizes the Master of the Rolls to issue *his fiat* against a bankrupt, though the third section of the act appears impliedly to take away all other jurisdiction.

Before the passing of the 3 & 1 W. 4, c. 94, s. 24, it was not the practice of the Master of the Rolls to hear motions, pleas, or demurrers in his Court, and whatever was presented for his decision, other than the hearing of causes, was brought before him by petition; but that act requires that any *future* Master of the Rolls shall hear and determine all motions arising in causes depending in the High Court of Chancery, as shall be duly made before him, according to the usage and practice of making motions in causes before the Chancellor, and to hear and determine all such pleas and demurrers filed in causes depending in Chancery as shall be duly set down for hearing before him; and that all orders made by the said Master upon the hearing such motions, pleas and demurrers, shall be deemed and taken to be valid orders of the Court of Chancery; sub-

(b) *Boehm v. Wood*, 1 Turner & R. 343; *ante*, vol. i. 732.

(c) *Daintry v. Daintry*, 6 T. R. 313; *ante*, 351.

(d) 2 Bro. Ch. Cas. 88; Com. Dig. Chancery, B. 4, note (x), 5 edit.

(e) 5 Ves. 578, *ante*, 351, 352.

(f) *Davy v. Seys*, Mos. 71.

(g) Com. Dig. Chancery, B. 4, note

(x), 5th ed.; and see 3 G. 2, c. 30.

(h) *Cunyngham v. Cunyngham*, Amb. 91; Dick. 145, S. C.

(i) 1 Newland Pr. Ch. 2d ed. 3, 4; Com. Dig. Chancery, B. 4, note (x), 5th edit.

(k) Ord. Ch. 37; Com. Dig. Chancery, B. 4, 5th edit.

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ject nevertheless in every case to be discharged, reversed, or altered by the Chancellor. And then section 25 provides "that the *present* Master of the Rolls need not hear or determine any such motions, pleas, or demurrers unless he shall think fit to give directions for that purpose." But it is said to be the opinion that his honor the Master of the Rolls has no jurisdiction respecting matters arising on the *common law* side of the Court of Chancery; (l) and lunacy we have seen is virtually excepted by 3 G. 2, c. 30.

The office of the Master of the Rolls, unlike that of Vice-Chancellor, partakes in its nature of a *distinct* jurisdiction, and every plaintiff in equity *may elect* whether he will have his cause set down and heard and decided by the Master of the Rolls or the Vice-Chancellor. (m) The jurisdiction of the Master of the Rolls is so far independent that it is not competent to the Lord Chancellor to order him to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, while that decree stands. (n) But exceptions to a Master's reports under a decree at the Rolls may be set down before the Lord Chancellor. (o) It has been supposed that the Master of the Rolls does not grant injunctions; the practice, however, is otherwise.

SECT. VIII.—*Of the Vice-Chancellor.*

SECT. VIII.
THE VICE-
CHANCELLOR.
Of the Vice-
Chancellor and
his Court and
jurisdiction.

The jurisdiction of the Vice-Chancellor was created by 53 G. 3, c. 24, entitled "An Act to facilitate the Administration of Justice," and whereby, after reciting that the number of appeals and writs of error in parliament had of late greatly increased, and that it had become necessary that a larger proportion of time should be allotted for hearing and determining such appeals and writs of error than has usually been employed for that purpose, and therefore, as well as for the better administration of justice in the several judicial functions belonging to the offices of the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal of the United Kingdom, it is *expedient that another judge should be appointed to assist in the discharge of such judicial functions*; it therefore enacts, that it shall and may be lawful for his Majesty, his heirs and successors, to nominate and appoint from time to time, by letters patent under the great seal of the United Kingdom, a fit person, being a barrister-at-law of fifteen years

(l) Madd. Ch. Pr. 20, 22; Com. Dig. Chancery, B. 4, note (r), 5th ed.
(m) Smith's Ch. Pr. 4.

(n) *Turner v. Turner*, 1 Swanst. 154.
(o) *Burdon v. Burdon*, 9 Ves. 499.

standing at the least, to be *an additional judge assistant* to the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal of the United Kingdom for the time being, in the discharge of the judicial functions of their respective offices, and to be called *Vice-Chancellor* of England, to hold such office during his good behaviour.

2. And that such Vice-Chancellor shall have full power to hear and determine *all causes, matters, and things* which shall be at any time *depending in the Court of Chancery* of England, *either as a Court of Law or as a Court of Equity*, or *incident to any ministerial office of the said Court, or which have been or shall be submitted to the jurisdiction of the said Court, or of the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal for the time being, by the special authority of any act of parliament, (p) as the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal shall from time to time direct*; and all decrees, orders, and acts of such Vice-Chancellor, so made or done, shall be deemed and taken to be respectively, as the nature of the case shall require, *decrees, orders, and acts* of the said Court of Chancery, or of such incident jurisdiction as aforesaid, or under such special authority as aforesaid, and shall have force and validity and be executed accordingly; *subject nevertheless*, in every case, to be reversed, discharged, or altered by the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal for the time being; and no such decree or order shall be enrolled until the same shall be signed by the Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal for the time being: *Provided always* that such Vice-Chancellor shall have no power or authority to discharge, reverse, or alter any decree, order, act, matter, or thing made or done by any Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal unless authorized by the Lord Chancellor, Lord Keeper or Lords Commissioners for the time being so to do, nor any power or authority to discharge, reverse, or alter any

(p) The terms of this enactment coupled with the object of the legislature, relieve the Chancellor in his burthensome office in a very extensive degree, and accordingly, in the Vice-Chancellor's Court, on Thursday, 7th August, 1834, the Vice-Chancellor said that he had consulted with his lordship on a point which had arisen incidentally, as to his (the Vice-Chancellor's) jurisdiction in cases of *lunacy*, where in fact a party was a lunatic though not found so by an inquisition; and

that after considering the act of parliament on this subject, his lordship was of opinion that the Vice-Chancellor might make a preliminary order to the Master to report in such cases, because such an order would not be taking the estate out of the party's hands. The final order would be, of course, reserved to the Lord Chancellor. And see the lucid observations of the Vice-Chancellor and Lord Brougham on this act, in *Ex parte Benson*, 1 Deac. & Chit. Rep. 326 to 340.

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decree, order, act, matter, or thing made or done by the Master of the Rolls. 3. Enacts that such Vice-Chancellor shall sit for the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal whenever they shall respectively *require* him so to do, and shall also at such other times as the Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal shall direct, sit in a *separate Court*, whether the Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal, or the Master of the Rolls shall be sitting or not; for which purpose the said Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal respectively, shall make such orders as to them respectively shall appear to be proper and convenient from time time as occasion shall require. 4. Enacts that such Vice-Chancellor shall have rank and precedence next to the Master of the Rolls.

The 5th section relates to the secretary and other officers of the Vice-Chancellor. The 6th section provides for the removal of the Vice-Chancellor upon an address of both Houses of Parliament, consequently the Vice-Chancellor is not so independent as the judges. The 7th section prescribes the form of the Vice-Chancellor's oath. The 8th section directs the funds out of which the 5000*l.* a year salary of the Vice-Chancellor (afterwards increased to 6000*l.*) and his officers shall be paid. The 9th, 10th, and 11th sections authorize the change of the fund. The subsequent sections have minor objects, and the 13th section prohibits the taking any fee or reward beyond the fixed salaries.

It will be observed that this act enacts that the Vice-Chancellor's decree shall be valid, and that he may sit in the absence of the Lord Chancellor or in a separate Court *at the same time* as the Chancellor is sitting, and the statute then declares his rank to be after the Master of the Rolls. The act directs that his decrees shall be subject to reversal by the Chancellor, and must be signed by the latter before they are enrolled. Consequently, where a cognovit was given, with a condition that if the *ultimate decision* of certain chancery suits should be for the plaintiff the defendant should pay 500*l.* within a month after *such* decision, or that execution should issue, it was held that the decree of the Vice-Chancellor, which had not been passed by the registrar, and against which a caveat had been entered with intent to appeal to the Lord Chancellor, was not such an *ultimate* decision as to authorize an execution. (*q*)

The duties of the Vice-Chancellor are to hear and determine all causes, matters, and things which shall be at any time

(*q*) *Dummer v. Pitcher*, 3 B. & Adol. 347.

depending in the Court of Chancery of England, either as a Court of Law or as a Court of Equity, or incident to any ministerial office of the said Court, or which have been or shall be submitted to the jurisdiction of the said Court, or of the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal for the time being, by the special authority of any act of parliament, as the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal shall from time to time direct. By section 3 the Vice-Chancellor is to sit for the Lord Chancellor in his absence, or in a separate Court at the same time that the Lord Chancellor is sitting. (r) We have seen that the Chancellor may, under the statute, delegate any branch of his jurisdiction to the Vice-Chancellor, as in matters of lunacy; (s) and the Vice-Chancellor may in vacation, though not in term time, issue a prohibition to an Ecclesiastical or other Court when attempting to exceed its jurisdiction. (t)

The Lord Chancellor may direct the Vice-Chancellor to hear a petition for a writ of procedendo to issue where a commission has been superseded on the Vice-Chancellor's order confirmed by the Lord Chancellor. (u)

The Vice-Chancellor has no jurisdiction under this act, and certainly not otherwise, to alter, vary or discharge an order made by the Master of the Rolls. (x) Under the former bankrupt acts he had jurisdiction to supersede a commission of bankruptcy, (y) and he might certify the propriety of a procedendo upon a supersedeas on his certificate, (z) and the Chancellor might have directed a procedendo upon a commission superseded by the Vice-Chancellor's order confirmed by the Chancellor. (a) But since the recent bankrupt act, 1 & 2 W. 4, c. 56, although by section 12 he may issue his fiat so as to initiate proceedings in bankruptcy, yet all further jurisdiction is taken away from him by implication, as the act provides that appeals from the Court of Review shall be heard *only* by the Chancellor himself. (b) Supposing that *by consent* the Vice-Chancellor might hear a motion to *discharge* or alter an order made by the Lord Chancellor, yet he is not authorized to *alter it*. (c)

(r) Sect. 8 gave a salary of 5000*l.* per annum, but which was increased to 6000*l.* per annum by 6 G. 4, c. 84.

(s) *Ante*, 447, note (p).

(t) *Donegal v. Donegal*, 3 Phil. 597; but not in term time, Com. Dig. Chancery, *Appendix*, tit. Prohibition.

(u) *Ex parte Hurd*, Buck, 45.

(x) *Whitehouse v. Hickman*, 1 Sim. & Sta. 104; 53 G. 3, c. 24, s. 2, *ante*, 447.

(y) 2 Rose, 162, 235, note; Com. Dig.

Chancery, B. 1, note (s), 5th edit.

(z) 1 Buck, 3.

(a) 1 Buck, 45; Com. Dig. Chancery, B. 1, note (s).

(b) Eden's (now 1d. Henley) Bankrupt Law, 3d ed. 475; and see Stewart's *Prac. Bank*, 94, 96; *Ex parte Lowe*, 1 Dea. & Chit. 30; but see *Ex parte Benson*, *id.* 324.

(c) *Saunders v. King*, 2 Jac. & W. 429.

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Notices of motions intended to be made before the Vice-Chancellor must express the same, unless by consent of the parties to the contrary or by the Chancellor's order. And motions upon such notices can be made only before the Lord Chancellor unless he shall otherwise direct. (c)

The suitors attending the Vice-Chancellor's Court have the same privileges as that of suitors of the other Superior Courts, and we have seen that where a person was taken in execution upon a *capias ad satisfaciendum* within the outer door of the Vice-Chancellor's Court of Lincoln's Inn, while the Court was sitting, the Lord Chancellor ordered the officer to attend with his prisoner forthwith, and examined the officer, and discharged the prisoner immediately. (d)

SECT. IX.—*Of the Equity Side of the Exchequer.*

SECT. IX.
EQUITY SIDE
OF EXCHEQUER.
The Equity side
of the Court of
Exchequer. (e)

The Exchequer, we have seen, was originally in all its branches a mere *Revenue Court*. But in progress of time, and by the fiction that the claimant was a debtor to the King, and that by the injury complained of he was rendered *less able* to satisfy the pretended debt to the King, it assumed jurisdiction over *equitable* matters, as we have seen it did over *legal* matters. And the Court of Chancery has also, in consequence of the superabundance of business there, instead of evincing any jealousy against this Court, actually sent equitable jurisdiction to it. (f) The Exchequer consists of two divisions, viz. the receipt of the Exchequer and the Court or judicial part of it, which is again subdivided into a Court of Equity and a Court of Common Law. The Court of Equity is holden in the Exchequer Chamber, and supposed to be so holden before the Lord Treasurer, the Chancellor of the Exchequer, the Chief Baron and three puisne Barons. But the 57 G. 3, c. 18, reciting the necessity for authorizing the Chief Baron *to sit alone in Equity*, empowers the *Lord Chief Baron* to hear and determine *alone* all causes, matters and things in the Court of Exchequer *as a Court of Equity*; and if he should, by sickness or other unavoidable cause, be prevented from sitting for those purposes, the King may, from time to time, appoint by warrant under his sign-manual, any other of the barons to hear and determine the same. (g) And the 3 & 4 W. 4, c. 41, ss. 25 &

(e) Orders in Chancery, 13th Dec. 1814, 2 Ves. & B. 419.

(d) *Orchard's Case*, 5 Russ. R. 159; ante, vol. i. 695.

(e) 3 Bla. Com. 45; Com. Dig. Courts, D. 7; Chit. Eq. Dig. tit. Courts, 1.

(f) *Newbery v. Wren*, 1 Vern. 221.

(g) 57 G. 3, c. 18, intitled, "An Act to facilitate the hearing and determining of Suits in Equity in his Majesty's Court of Exchequer at Westminster," passed 29th

27, has, with a view to increase the ability of despatching equity proceedings in this Court, extended the power of appointing a Baron to sit in equity in lieu of the Chief Baron, when the latter is sitting at Nisi Prius or at the judicial committee of the Privy Council; and it seems to be considered that under the first statute the Chief Baron sitting alone has authority even to set aside a decree made by the whole Court. (h) Since this statute 57 G. 3, c. 18, the Court of Exchequer is, for certain purposes, considered *always open* all the year round as a Court of Equity. (i)

Anciently equity suits could only be instituted in this Court in *revenue matters*, and when the party was a debtor to the crown, or was a clergyman bound to pay to the king his first fruits and annual tenths. The latter circumstance occasioned the clergy in general to file their bills relative to tithes in this Court; (k) and this probably gave rise to the practice more frequently to institute *tithe suits* in this Court, which had become more conversant with the subject than the Court of Chancery. By the like fiction that the law side of the Exchequer assumed jurisdiction over all personal actions, other persons, also feigning themselves to be debtors to the king, instituted their suits in the equity side of this Court; and a bill may be filed in the equity side of the Court of Exchequer for a legacy, or against

March, 1817. "Whereas the proceedings on the common law side of the Court of Exchequer have of late years greatly increased, by reason whereof a sufficient proportion of time cannot be allotted for hearing and determining suits in equity in the said Court; and whereas the business of that Court might be more easily despatched, if the Lord Chief Baron or one other of the Barons of the degree of the coif were duly authorized to hear and determine suits and proceedings on the equity side thereof, as is hereinafter enacted; be it therefore enacted, &c. that from and after the passing of this act, the Lord Chief Baron of the said Court for the time being shall have power to hear and determine all causes, matters and things which shall be at any time depending in the said Court of Exchequer, as a Court of Equity; and that if the said Lord Chief Baron shall by sickness or other unavoidable cause, be prevented from sitting for the purposes aforesaid, then it shall and may be lawful for his Majesty and his successors to nominate and appoint, from time to time, by warrant under the royal sign manual, revocable at pleasure, any one other of the barons of the degree of the coif of the said Court for the time being, to hear and determine such causes, matters and things.

Sect. 2 enacts, "That the said Lord Chief Baron, or the Baron so to be appointed, shall sit at such times as the Lord Chief Baron and such Baron shall respectively, with regard to matters to be heard before them respectively, appoint, and whether the rest of the said Barons of the said Court shall be sitting or not; and that all decrees, orders and acts of the said Lord Chief Baron, or of such Baron so appointed as aforesaid, shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders and acts of the said Court of Exchequer, and shall have force and validity, and be executed accordingly, subject only to be reversed, discharged or altered by the House of Lords, upon appeal thereto and as hereinafter mentioned.

Sect. 3. Provided that it shall and may be lawful for the said Lord Chief Baron, upon petition by any of the parties concerned, to re-hear any cause or matter before decided, ordered, adjudged or decreed by such Lord Chief Baron or by any other Baron appointed as aforesaid; and also for any Baron appointed as aforesaid, upon petition as aforesaid, to re-hear any cause or matter before decided, ordered, adjudged or decreed by him the same Baron, and respectively thereupon to make such order as may be just."

(h) *Jones v. Roberts*, 1 M'Clel. & Y. 567.

(k) 3 Bla. C. 46, 47.

(i) *Tucker v. Sanger*, 10 Price's R. 132.

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Advantages of filing a bill for an injunction in this Court of Exchequer in preference to Chancery.

Tithes.

When the object of an equity suit is in part to obtain an injunction and to *stay a trial at law*, it may in many cases be preferable to file a bill in the Exchequer than in Chancery, because in the former Court an injunction will even *stay a trial*; (m) whereas in the latter an injunction will not stay a trial but only *execution*, unless it were obtained before declaration. (n) Another advantage results from instituting an equity suit in this Court, viz., that by the practice of the Court of Exchequer on the equity side, if a question of *mere law* arise in the course of its equitable jurisdiction, the Court will decide upon it without the delay and expense of referring it to another jurisdiction, because the Lord Chief Baron, and the Puisne Baron when sitting for him, is as much a judge of a Court of Law as of Equity, and therefore it is unnecessary to delegate the question of law to another Court. (p) We have seen that, although it was originally otherwise, yet it has been long established that the Court of Chancery has jurisdiction in *tithe* causes, and they are frequent in that Court, and that as the decree continues the liability to account down to the time when the *decree* is pronounced, the Court of Chancery is in that respect the preferable Court. (q) But this equity side of the Court of Exchequer is the *original* and proper jurisdiction for tithes, that Court having for centuries taken cognisance of them, probably on account of the right of the crown to the first fruits. (r) There is, as observed by Mr. Maddox, some difference in these tithe cases as to the proceedings in the Court of Chancery and the Exchequer. In the Exchequer, an account of tithes is decreed not prospectively, but only up to the time of filing the bill: but in the Court of Chancery the decree is for an account up to *the time of the decree*, (s) or, as Lord Hardwick says in another case, "down even to the time of the Master's report;" (t) or as Baron Clarke says in a third case, "an account for tithes may be carried on as long as the suit is depending between the parties." (u) It is observable also that though the

(l) *Duncumbent v. Stint*, 1 Chan. Cas. 121; Chit. Eq. Dig. Legacies, 640; *Sharples v. Sharples*, 1 McClell. Rep. 506.

(m) *Earnshaw v. Thornhill*, 18 Ves. 488; *Nelthorpe v. Law*, 13 Ves. 324; 2 Mad. Ch. Pr. 220; Chit. Eq. Dig. tit. Practice, Injunction, 1036, 1039.

(n) *Id.* and 1 Mad. Ch. Pr. 133; *Gartlick v. Pearson*, 10 Ves. 452; 3 Woodes. Vin. L. 411.

(p) 2 Mad. Ch. Pr. 474.

(q) *Ante*, 410, 420; 1 Mad. Ch. Pr. 104 to 106.

(r) *Ante*, 451; and 1 Mad. Ch. Pr. 105.

(s) 2 Atk. 136; 2 P. Wms. 463; *Carellon v. Brightwell*.

(t) 2 Atk. 137.

(u) *Bell v. Read*, 3 Atk. 590.

demand for tithes be ever so small and inconsiderable, yet still a bill in equity may be filed for the recovery of them, on account of the permanently accruing profit. (x) When the title to tithes has been clearly made out, the Court of Chancery or Exchequer decrees an account: and where a modus or real composition is pleaded and supported by reasonable evidence, it is the practice to direct an issue at law, before they decree against the common law right of the parson. The issue from the Court of Chancery is tried in the King's Bench or Common Pleas: but an issue from the Exchequer is tried on the law side of that Court. (y)

The Court of Exchequer may grant orders in nature of the writ of *ne exeat regno*, applying them only to cases to which the Court of Chancery would confine the writ. (z) But in general the application for that writ should be to the Chancellor or Master of the Rolls.

In *parochial matters* it is sometimes expedient to resort to the equity side of the Court of Exchequer; thus on petition by inhabitant householders under the 52 G. 3, c. 101, on account of misapplication of funds of a parochial charity by trustees, where the application does not extend to regulate or alter the charity, or to carry it into execution, the Court of Exchequer has jurisdiction, especially when the charity was established by royal charter. (a) So the Exchequer has jurisdiction as a Court of Equity in matters of public accounts between government and the persons employed. (b)

In some respects the Court of Exchequer has equitable jurisdiction, which the Court of Chancery has not. Thus no information can be brought in Chancery for such mistaken charities as are given to the king by the statutes for suppressing superstitious uses; nor can Chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is merely a trustee. (c) Such causes must be determined in the Court of Exchequer as a Court of Revenue; which alone has power over the king's treasure, and the officers employed in its

The Equity side of the Exchequer has exclusive equitable jurisdiction in cases relative to crown property and superstitious uses.

(1) 4 Bro. P. C. 314; Gwillim, 736.

(y) *Ligon v. Strutt*, 2 Anstr. 601; *Baker v. Athill*, 2 Anstr. 493; 1 Mad. Ch. Pr. 105, 106.

(z) 11 Ves. 46.

(a) *In re Chertsey Market*, 6 Price's R. 261.

(b) *Attorney-General v. Lindegren*, 6

Price's R. 287; see further, 1 Chit. Eq. Dig. 253.

(c) 3 Bla. Com. 428; *Huggins v. York Buildings' Company*, Chanc. 24 Oct. 1740; *Reeve v. Attorney-General*, Chanc. 27 Nov. 1761; *Lightboun v. Attorney-General*, Chanc. 2 May, 1743.

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management; unless where it properly belongs to the Duchy Court of Lancaster, which hath also a similar jurisdiction as a Court of Revenue, and like the other consists of both a Court of Law and a Court of Equity. (d)

SECT. X.—*The Jurisdiction and General Practice of the Ecclesiastical Courts.*

General Observations.

Section I.—*Subjects of Ecclesiastical Jurisdiction.*

First, When these Courts have Jurisdiction.

I. Over Private Injuries.

Jurisdiction is local as to Person.

1. Causes Pecuniary.

2. Matrimonial Causes.

1. Jactitation of Marriage.

2. Nullity of Marriage.

3. Restitution of Conjugal Rights.

4. Divorces.

1. For Cruelty.

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Alimony.

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II. Over Public Matters and Offences.

1. Church Rates.

2. Schools.

3. Ecclesiastical Officers.

1. Churchwarden.

2. Ministers, &c.

4. Offences Spiritual, as Ecclesiastical Perjury, Simony, Usury, Brawling, Assaulting Clergy, Adultery, Fornication, &c.

5. Limitation of Suits in Ecclesiastical Courts.

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Secondly, When these Courts have not Jurisdiction.

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Section II.—Of the several Ecclesiastical Courts.

In general.

1. Archdeacon's Court.

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How to obtain Probate or Letters of Administration, and entering caveats, &c.

How to obtain Assignment of Administration Bond.

6. The Court of Faculties.

SECT. X.
THE ECCLESIASTICAL JURISDICTION AND COURTS.

We have alluded in a former page to the ancient struggles of the different Courts to increase their own or diminish or controul the jurisdiction of other Courts; (e) and “hence,” as observed by Willes, C. J., “so many jarring cases on the head of prohibition, difficult to reconcile; for when the power of the church ran very high, the judges were cautious in granting prohibitions; but when it did not run quite so high, the judges ventured to go further in granting them.” (f) We have, however, seen that happily all feelings of that nature have long ceased. (g) Mr. Justice Blackstone (writing in A.D. 1765) observed, that it must be acknowledged to the honour of the Spiritual Courts that, though they continue to decide many

(d) 3 Bla. Com. 428.

(e) *Ante*, 307.

(f) In *Chessman v. Hoby*, Willes, 680.

(g) Per Sir J. Nicholl, in *Grignon v. Grignon*, 1 Hagg. Ecc. Rep. 545, *ante*, 307.

questions, which are properly of *temporal* cognizance, yet justice is in general so ably and impartially administered in those tribunals, especially of the superior kind, and the boundaries of their power are so well known and established, that no material inconvenience can arise from that jurisdiction still continuing in the ancient channel; (*h*) and unquestionably when we reflect that since the learned commentator published that observation, such distinguished individuals as Sir William Scott, (afterwards Lord Stowell,) Sir J. Nicholl, Dr. Lushington, &c. have presided in the superior Ecclesiastical Courts, it will be concluded that the spiritual jurisdiction has been still better explained and enforced. It has been usual to consider ecclesiastical or spiritual jurisdiction under two heads; as, *first*, what are or are not *subjects of such jurisdiction* in one or other of the Ecclesiastical Courts, without regard to the particular Court in which it is exercised; and, *secondly*, with reference to the *Ecclesiastical Courts* themselves, and the separate jurisdiction of each, (*i*) and we will also take a practical view of the *proceedings* in these Courts in general, and in several of the most usual suits.

First, The Subjects of Ecclesiastical Jurisdiction.

There are numerous injuries and offences as well of a *private* as of a *public* nature which are not remediable or punishable in a Court of Law or Equity, *but only* in one of the *Spiritual or Ecclesiastical Courts*; others where the *latter Courts* and Courts of Equity or Law have *concurrent jurisdiction* with the Ecclesiastical Courts, and yet it may be preferable to proceed in the latter. And first of *private* injuries remediable or punishable in these Courts, (and which are the more immediate objects of consideration in this work.) Those cognizable in the Ecclesiastical Courts have usually been arranged under three general heads, as 1. Causes *pecuniary*; 2. Causes *matrimonial*; (*l*) 3. Causes *testamentary*; (*m*) and to these we will add two others of considerable importance and frequency, viz. 4. *Suits for defamation*; 5. *Suits for perturbation of pews*, or disturbances of seats in a church.

First, Of the subjects of Ecclesiastical jurisdiction in general. (h)

First, jurisdiction over private injuries.

(*h*) 3 Bla. Com. 98, 99.

(*i*) See as to the former, 3 Bla. Com. 87 to 103; and as to the latter, *id.* 61 to 68.*

(*k*) As to the Ecclesiastical or Spiritual Courts in general, see Oughton *Ordo judiciorum*, translated in part by Law; Clerks

Assistant in Practice Eccles. Court; Consett on Courts; Burn's Eccle. Law, tit. Courts; Com. Dig. Courts, N.

(*l*) 3 Bla. Com. 87, 88.

(*m*) *Parham v. Templer*, 3 Phil. R. 254.

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Jurisdiction principally depends on locality of the defendant within the district.

One general rule of great importance is, that the Ecclesiastical Courts have not merely jurisdiction with reference to the locality of the *subject-matter*, but in the locality of the *person* cited; and, therefore, although the defendant may usually reside out of the kingdom, yet if he be served with a citation within the jurisdiction of an Ecclesiastical Court here, (as that of the Consistory Court of London in a suit there for nullity of marriage,) that Court has jurisdiction.(n) So in matrimonial suits the power of the Court is *in personam*, and the Court cannot enforce a decree upon a party who is out of the kingdom;(o) but if the party be in England, an Ecclesiastical Court has jurisdiction to try the marriage of English subjects wherever contracted.(p) But generally speaking, as regards testamentary causes, all Ecclesiastical jurisdictions are limited in their authority to property locally situate within their district.(q).

1. Causes pecuniary.
For Tithe.

1. *Causes pecuniary* include claims for *Tithes*, but when the *right* is disputed, these can only be instituted in the Ecclesiastical Courts between *spiritual* persons, and against *lay* persons only to compel the render of tithe in kind when the general right is admitted;(r) and in the case of predial tithe, it is now usual to proceed by action at law, viz. for treble value incurred under the statute, by not setting out the tithe; or where there has been an agreement to pay a composition, by action of *assumpsit* or debt on such agreement; or when the dispute is between the tithe owner and several parishioners, or where a *modus* is insisted upon, then by a bill in Chancery, or, as we have seen, even more frequently on the equity side of the Court of Exchequer; and the latter suit in general is preferable, because full costs are recoverable in an equity suit for tithes in the Exchequer, unless there has been a previous adequate tender.(s) When there has been an agreement for a composition, the remedy is usually at law, and it has been supposed that in such a case a suit in the Consistorial Court for subtraction of tithe is not maintainable, and that the composition need not be tendered; but recently Sir John Nicholl decided, on appeal from the Consistorial Court of Exchequer to the Arches

(n) Per Vice-Chancellor in *Donegal v. Donegal*, 3 Phil. 611, 586; and see *Morse v. Morse*, 2 Hagg. 610.

(o) *Morse v. Morse*, 2 Hagg. 610.

(p) In *Harford v. Morris*, 2 Hagg. Cons. R. 425.

(q) *Crosley v. Archdeacon of Sudbury*,

3 Hagg. Ecc. R. 197.

(r) 3 Bla. Com. 88, 89; and see *Meluish v. Lucy*, post, 457, note (t).

(s) *Ante*, vol. i. 27, n. (u), 398, 399; *Stockwell v. Terry*, 1 Ves. 118; and 2 Madd. Chan. Pr. 556.

Court, that as the Ecclesiastical Court had power to interfere in cases of modus, he considered they had jurisdiction also in cases of composition, which were in effect moduses for the time being, and reversed the sentence below, and decreed that the value of the tithe, to be ascertained by the registrar, should be paid to the appellant with his costs. (t) In a suit by a clergyman for small tithe, he will in general recover his costs in the Ecclesiastical Court, although he succeed only in part, deducting the costs of the pleading relative to the unsuccessful part. (u) There is one advantage, incident to a proceeding for tithe in the Ecclesiastical Court, viz. that although a party has been imprisoned for more than a year upon a sentence of the Ecclesiastical Court, and writ de contumace capiendo thereon, he will not be entitled to be discharged under the 48 G. 3, c. 132, but will be perpetually imprisoned until he has fully obeyed the sentence. (x)

Ecclesiastical dues to the clergy, as pensions, mortuaries, compositions, offerings, and whatever falls under the denomination of surplice fees for marriages or other ministerial offices of the church, are also recoverable in the Ecclesiastical Court. (y) But *curates' salaries* are more usually recovered by action at law. (z) Claims in respect of *Spoilation* (a) or *ecclesiastical waste* or dilapidations, are also cognizable in these Courts, (b) but it is more usual to proceed for the latter by action at common law, (c) at least it is so against the personal representative of the late incumbent. (d) The instances of suits at law for ecclesiastical waste are confined to actions by a succeeding against a late incumbent, or against his executors; but the jurisdiction of the Consistory Court is more extensive, for a sequestrator of a benefice being bound to repair the vicarage-house and buildings, may be sued pending the sequestration by the bishop and churchwardens in the Bishop's Court, to compel him to repair; though after a sequestration has been entirely determined, such jurisdiction might be questionable. (e) On principle it should seem that every incumbent who permits the

For Ecclesiastical Dues, &c.

Spoilation, or ecclesiastical waste.

(t) *Melluish v. Facy*, Arches Court, 8th July, 1834, cor. Sir John Nicholl. See the libel and proceedings, *post*.

(u) *Layden v. Flack*, 2 Hagg. Cons. B. 509.

(x) *Ex parte Kaye*, 1 B. & Adol. 652. Courts of Equity have power to discharge a prisoner from the contempt, *ante*, 429; but there does not appear as yet any such power extended to Ecclesiastical Courts; and see *Barlee v. Barlee*, 1 Addam's R. 301.

(y) 3 Bla. Com. 89, 90.

(z) Cowp. R. 437; Dougl. 14; 3 Bla. Com. 90.

(a) 3 Bla. Com. 90.

(b) *Ibid.* 91, 92. In *Whinfield v. Watkins*, 2 Phil. R. 3, n. (a), it is said that suits for dilapidations are most properly and naturally to be in the Spiritual Courts.

(c) *Ante*, 593; *Bird v. Relfe and Wife*, 1 Nev. & Man. 415; 1 Bar. & Adol. 826, S.C., 2 Phil. R. 3, note (a); *Wise v. Metcalfe*, 10 B. & C. 299.

(d) *Sollers v. Lawrence*, Willes, 420, 421.

(e) Per Sir William Scott in *Whinfield v. Watkins*, 2 Phil. R. 8.

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buildings belonging to his benefice to continue dilapidated, might be prosecuted by the bishop and churchwardens in the Consistory Court so as to compel him to repair; and where existing dilapidations are daily increasing, such a proceeding would be proper, instead of waiting until his decease, perhaps without leaving assets; and this seems to be the only Court in which a bishop, or other ecclesiastical person *still in possession of his benefice*, can be compelled to repair. (f) In a preceding page we have seen the nature and extent of the repairs which an incumbent is bound to make. (g) So a suit may, if the facts warrant, be sustained by churchwardens against a bishop, as impropiator of a portion of great tithes of the parish, to compel him to repair the chancel; (h) and if a custom for the parishioners to repair be pleaded, a prohibition goes to the Ecclesiastical Court, and such question of fact will be heard in a Court of Law by a jury, and if found in favour of the bishop, will be conclusive; and the Ecclesiastical Court cannot investigate whether the alleged custom be illegal; (i) and the impropiator will therefore be entitled to be dismissed with all his costs incurred in the Ecclesiastical Courts. (j)

2. Matrimonial
causes.

2. We have seen that Courts of Equity have not in general any direct jurisdiction over *matrimonial causes*, but that they are exclusively taken cognizance of in the Spiritual Courts, (k) especially in cases of clandestine marriages, (l) although the Chancellor may direct that the marriage of a ward in Chancery shall be repeated more formally. (m) But the Ecclesiastical Court cannot annul a marriage after the death of one of the parties, as it might bastardize the issue, (n) though it may proceed to punish the survivor, as for incest; (n) and a sentence of divorce on the ground of incest may be *repealed* by the Spiritual Court after the death of the parties. (o)

Matrimonial causes are of several descriptions, as *first*, suits for a *malicious jactitation*, or boasting of a pretended marriage with the complainant without his consent, when there has been no marriage in fact; (p) *secondly*, suits for *nullity of marriage* on account of force or fraud, (q) or incest, or too near

(f) *Ante*, 359, 360, 388.

(g) *Ante*, vol. i. 393. As to the question how far a bishop may be prohibited or prevented by injunction from committing or permitting waste, *ante*, 359, 360.

(h) *The Bishop of Ely v. Gibbons and another*, on appeal, 4 Hagg. Ec. R. 156.

(i) *Ibid.* 163, 164.

(k) *Ante*, 434; *Hatfield v. Hatfield*, 5 Bro. C.C. 100; and see in general Chit. Eq. Dig. tit. Courts, II. Ecclesiastical; 3 Bla. Com. 92 to 95.

(l) *Middleton v. Crofts*, 2 Atk. 668, 671.

(m) *Ante*, 435, note (e).

(n) 3 Bla. Com. 440; Cro. Jac. 186; *Brownward v. Edwards*, 2 Ves. 245; *Elliot v. Gurr*, 2 Phil. R. 19, 21, 22.

(o) Co. Litt. 33, 244; 5 Co. 98; 7 Co. 44; Cro. Jac. 186.

(p) *Lord Hawke v. Corri*, 2 Hagg. Cons. R. 284.

(q) *Harford v. Morris*, 2 Hagg. Cons. R. 423; *Ewing v. Wheatley*, id. 175.

relationship; or incapacity to consent; or want of actual consent, as in case of lunacy; or great mental weakness imposed upon by fraud, and which may be instituted by the committee; (q) or for want of due form, as misnomer in publication of banns; or on account of impotency or sterility; *thirdly*, suits for *restitution of conjugal rights*; *fourthly*, suits for *divorces* on account of cruelty or adultery; and *fifthly*, suits for *alimony*. (r)

With respect to a suit for *jactitation of marriage*, though of rare occurrence, yet if a person pretend a marriage which has no existence whatever, and proclaim it to others, the law considers it a malicious act, subjecting the party against whom it is set up to various disadvantages of fortune and reputation, and imposing upon the public (which for many reasons is interested in knowing the real state and condition of the individuals who compose it) an untrue character, and interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection. (s) It is therefore a fit subject of redress; and this redress is to be obtained by charging the supposed offender with having *falsely and maliciously* boasted of a matrimonial connection; and upon proof of the fact, obtaining a *sentence*, enjoining him or her to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceeding. (s) To such a suit there may be three different defences; 1st, a denial of the jactitation or boasting; 2d, an assertion that a marriage actually passed, (and then the suit assumes another shape, that of a suit for restitution of conjugal rights); 3d, a defence of more rare occurrence, viz. that though no marriage has passed, yet the pretension was fully authorized by the complainant; and that therefore, though the representation was false, yet it was not malicious, and cannot be complained of as such by the party who authorized it; (t) and therefore where a person had lived in adulterous connection with the wife of another man, and every where introduced her as his wife, his suit for malicious jactitation was dismissed. (u)

With respect to suits for *nullity of marriage*, any party interested, though a third person, and even a committee of a lunatic, or a person claiming an estate in remainder on failure

Suits for jactitation.

Suits for nullity of marriage.

(q) *Parnell v. Parnell*, 2 Hagg. Cons. R. 169; *Portsmouth v. Portsmouth*, 1 Hagg. Cons. R. 355.

(r) 3 Bla. Com. 92 to 95.

(s) Per Sir William Scott, in *Lord Hawks v. Corri*, 2 Hagg. Consist. R. 285.

(t) *Ibid.* 285, 286.

(u) *Ibid.* 292.

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of issue, may institute a suit for nullity of marriage in the Consistory Court, (x) or may *intervene* in a Court of Appeal; (y) and in general there should, for greater security, whilst parties and witnesses are living, be a sentence in the Ecclesiastical Court, though the marriage be absolutely void, as in the case of lunacy. A father of a minor has a right to institute and prosecute a suit for nullity of marriage against the will of the minor. (z) If the ground be a publication of banns in a wrong name, as Coxon Tongue, when the correct name is *Edward Coxon Tongue*, it must be proved that such an erroneous publication was with the knowledge of the parties. (a) And we have seen that an Ecclesiastical Court will not annul a marriage by banns unless there was express or implied fraud in the transaction, as by false names for a fraudulent purpose. (b) But if such a fraud be proved, the marriage will in general be void, as even the omission of one Christian name. (c)

A sentence of *nullity of marriage* may be obtained *propter impotentiam* or *sterility* in either sex, when it can be shewn to have existed at the time of the marriage; suits of that nature have certainly occurred even in modern times, but they are comparatively rare. (d)

Suits for restitution of conjugal rights.

Suits for *restitution of conjugal rights*, when one of the parties refuses to cohabit, are not unfrequent, and have been sometimes adopted as a mode of trying the validity of the marriage, which must be charged to have taken place. If the complainant, whether wife (e) or husband, (f) succeed, the sentence of the Court is, that the party is the lawful wife or husband of the opponent, and that the latter, if an husband, do receive her home in the character of a wife, and do treat her with conjugal affection, and do certify to the Court that he has done so by the first sessions of the next term. And if such sentence be disobeyed, the party will be perpetually imprisoned under process from a Court of Law, as in other cases. (f) The Courts in

(x) *Donegal v. Chichester*, 3 Phil. Ecc. Rep. 590, 592, 593; 1 Add. R. 16, S. C.; and see *Parnell v. Parnell*, 2 Hagg Consist. Rep. 169; *Portsmouth v. Portsmouth*, 1 Hagg. Ecc. Rep. 355.

(y) *Ex parte Turning*, 1 Ves. & B. 140; *Donegal v. Chichester*, 3 Phil. R. 593, note (b); and see *post* as to *Intervention*.

(z) *Bowyer v. Ricketts*, 1 Hagg. Cons. R. 214, 215.

(a) *Tongue v. Allan*, Consistory Court, London, 5th July, 1831, per Dr. Lushington. And see form of the libel in such a suit *post*.

(b) *Ante*, vol. i. 55.

(c) *Ante*, vol. i. 53, and notes; *Periget v. Tomkins*, 2 Hagg. Consist. R. 142; *Wyatt v. Henry*, *ibid.* 215; *Sullivan v. Sullivan*, *ibid.* 238; *supra*, note (a).

(d) See instances and observations, Chitty's Medical Jurisprudence, 374, 375; see instances of such suits against the woman, *Guest v. Shipley*, 2 Hagg. Cons. R. 321; *Biggs v. Morgan*, *ibid.* 324; against the husband, *Greenstreet v. Cumyns*, 2 Hagg. Cons. R. 332.

(e) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 51, 137.

(f) *Barke v. Barlee*, 1 Addams, 501; *Swift v. Swift*, 4 Hagg. Cons. R. 139.

general regret the legal necessity for pronouncing such a sentence, because it inflicts upon one, if not both the parties, great distress, and is scarcely possible to be productive of any happiness, and occasions perpetual imprisonment in case of continued disobedience of the sentence.(g) Perhaps the same reasons which induced the legislature to enact that no promise to marry should be specifically enforced in the Ecclesiastical Court should lead to a modification of this law.

The cases, when or not an Ecclesiastical Court will divorce a mensâ et thoro have been cursorily considered in the preceding volume; and we have there seen that the only grounds of divorce arising *after* marriage, are either such *intolerable cruelty* as amounts to what is technically though somewhat singularly termed *legal scitiae*, or cruelty,(h) or guilt by the husband of some infamous unnatural crime or practice,(i) or adultery. The Courts have judiciously declined to define what *degree* or instances of cruelty will amount to the *legal cruelty* necessary to be established; but the numerous cases in the books establish that mere bad temper, harshness or unkindness, are not sufficient grounds of divorce.(k)

In order to obtain the assistance of this Court, the parties applying on account of *adultery* must be free from similar imputation; and therefore a husband cannot obtain a divorce in the Ecclesiastical Court if the wife recriminate and establish that he had also been faithless to the marital vow,(l) whether before or not until *after knowledge of her infidelity*;(m) so if a husband be so insensible of the injury as to cohabit with his wife after knowledge of her infidelity,(n) then in either of these cases the Ecclesiastical Court will not interfere at his instance.

By the practice of the Court a matrimonial suit frequently changes its *original* object, and this even on a collateral ground. Thus in a suit against a woman for jactitation of marriage, if she plead that she and the complainant were duly married, and she establish the fact, the sentence will be restitution of her conjugal rights.(o) And in a suit by a wife for *restitution of conjugal rights*, if the husband, in defence or

Suits for divorce
for cruelty or
adultery.

(g) See observations in *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 133.

(h) *Ante*, vol. i. 59; per Dr. Lushington in *Neeld v. Neeld*, 6 Dec. 1831, 4 Hagg. Ec. Cas. 264; and see that case at length in supplement to this work of A. D. 1834 to vol. i. 59. See instances of divorces for cruelty and violence, *Harris v. Harris*, 2 Hagg. Cons. R. 143; *Waring v. Waring*, *ibid.* 158. It may be answered by necessary self-defence. *Waring v. Waring*, *ibid.* 168.

(i) *Ante*, vol. i. 59.

(k) See *Neeld v. Neeld*, 4 Hagg. Eccl. Cases, 264, and *ante*, vol. i. 59.

(l) 1 Ought. 317; Burn's Eccl. L. Marriage, xi.

(m) *Procter v. Procter*, 2 Hagg. Cons. Rep. 292.

(n) 1 Ought. 317; Burn's Eccl. L. Marriage, xi.

(o) Per Sir W. Scott in *Hawke v. Cawri*, 2 Hagg. Cons. R. 235, 236.

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excuse, allege the adultery of the wife, he may in that very suit pray and proceed for a divorce on the latter ground. (*p*) So in a suit against the husband for cruelty, a defensive allegation, pleading distinctly and substantially adultery by the wife, is admissible without a separate citation on the part of the husband. (*q*) So a wife has been permitted, in a suit instituted against the husband for cruelty, to give in additional articles to the libel pleading acts of adultery by the husband, (*r*) especially if they have recently, and since the institution of the suit, come to her knowledge. (*s*)

In a suit by a husband for *divorce* on the ground of adultery, if the wife's allegation responsive to his libel plead that adultery was committed by the husband, he may meet the same by a defensive plea, and then the wife may afterwards offer additional articles negating parts of the husband's defensive allegation, and the latter will be admissible, although a fourth allegation, because they may afford the Court better means of arriving at a just conclusion. (*t*)

Suits for Alimony, and costs pending suits for divorce. (*u*)

The jurisdiction of the Spiritual Court, in decreeing *alimony*, is incidental to a decree of divorce; and generally speaking alimony cannot be otherwise obtained, excepting indeed in cases of agreement, when we have seen the Court of Chancery may interfere, (*x*) or excepting by act of parliament, when there has been a divorce there. (*y*) In general, where there is a decree of divorce in the Ecclesiastical Court, on account of the established adultery of the wife, no decree of alimony follows; but upon a divorce bill in the Lords, on account of the adultery of the wife, the husband is always required to make provision for maintenance, lest by total destitution she should be driven to continue in a course of vice. (*z*) In suits instituted either by

(*p*) *Lambert v. Lambert*, Consistory Court, London, July 5, 1834.

(*q*) *Best v. Best*, 1 Addams, 441.

(*r*) *Barrett v. Barrett*, 1 Hagg. Eccl. Rep. 22.

(*s*) *Sampson v. Sampson*, 4 Hagg. Rep. 285.

(*t*) *Sarjeant v. Sarjeant*, Consistory Court, Friday, June 27, 1834. Per Dr. Lushington.

This was a suit which had been frequently before the Court on admission of allegations. It was promoted by Captain James Sarjeant against Harriet his wife, for a divorce on the ground of adultery. In the allegation responsive to the libel, the wife pleaded adultery committed by the husband, which the latter met by a defensive plea, and additional articles were now offered on behalf of the wife, the object of which was to negative cer-

tain parts of the husband's defensive allegation.

After hearing Dr. Phillimore and Dr. Addams for the husband, against the allegation, and the King's Advocate and Dr. Burnaby, for the wife,

Dr. Lushington considered that the articles were, under the circumstances, admissible, though this was a *fourth* allegation, as they might afford the Court better means of arriving at a just conclusion.

(*u*) See in general 1 Bla. Com. 441, and notes.

(*x*) *Ante*, 434, 435.

(*y*) Dick. 791; see *ante*, vol. i. 58, note (*u*); *ibid.* 60.

(*z*) See *v. Thurlow*, 4 D. & R. 17; but it would be well to make her future chastity and separation from her paramour an indispensable condition of the continued

the husband or the wife, the latter is a privileged party as to costs, and is entitled to *alimony pending the suit*, on the principle of the whole property being by law vested in the husband, and her consequent incapacity to support or defend herself during the coverture. If the wife, therefore, be under the necessity of living apart, it is also necessary that she should be *sub-sisted during the pendency of the suit*, and that she should also be enabled to *procure justice* by being provided with the means of defence. This arises out of the ordinary condition of conubial society, and the state of the property between the parties as usually vested in the husband, under the more ancient law of the kingdom. (a) But after the adultery of the wife has been established by the decree, it would in general be unjust, excepting upon the principle acted upon in the House of Lords, to require the husband to pay alimony, and therefore there is no instance in the Ecclesiastical Court of a decree of alimony in such a case. (b)

If a wife be reluctant to institute a suit for a divorce in the Spiritual Court, she may at law, whilst resident with her husband, or at a place prescribed by him, (c) or when compelled to leave him by legal cruelty, subject him to the payment of all necessaries according to his fortune and rank, by contracting debts for necessaries in his name.

But when the wife has a sufficient independent or separate income, as £100 a year, and the husband the same, no alimony or costs pending the suit will be allowed, (d) though where her pin-money is small, the Court will add some alimony pending the suit. (e) When she has not, then, in case of a divorce for the misconduct of her husband, she is entitled to alimony, the *general proportion* of which, it is said, is rather higher than one-sixth, or about one-fifth of the income of the husband, to be paid from the date of the decree; (f) and even a moiety of the property has been given where the wife brought the whole of the property and she was blameless; (g) and although the husband pretend to have assigned away all his property, he may nevertheless be compelled to pay alimony pending the suit

payment. In France the wife and paramour are compellable to separate.

(a) Per Sir W. Scott, *Wilson v. Wilson*, 2 Hagg. Cons. R. 204; and see *Beevor v. Beevor*, 3 Phil. R. 261; *Portsmouth v. Portsmouth*, 3 Addams R. 63.

(b) 3 Bla. Com. 94, 95; nor is a husband liable for necessaries in such a case, *R. v. Flinton*, 1 B. & Adol. 227.

(c) *Montague v. Benedict*, 3 B. & C. 631; *Seaton v. Benedict*, 5 Bing. 28; *Hunt v. Blaquore*, 5 Bing. 550.

(d) *Briscoe v. Briscoe*, 2 Hagg. Cons. R. 199; *Wilson v. Wilson*, id. 204, 205; *Beevor v. Beevor*, 3 Phil. R. 261.

(e) *Briscoe v. Briscoe*, 2 Hagg. Cons. Court, 199; *Beevor v. Beevor*, 3 Phil. R. 261.

(f) *Briscoe v. Briscoe*, 2 Hagg. Cons. R. 199; *Rees v. Rees*, 3 Phil. R. 392; *Cox v. Cox*, 3 Addams's R. 276.

(g) *Cooke v. Cooke*, 2 Phil. R. 40; *Smith v. Smith*, 2 id. 235.

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for a divorce on account of adultery, at the rate of £50 per annum out of £140 per annum; (h) and the reduction of the husband's income by unprofitable speculations, is no ground for a proportionate reduction of permanent alimony allotted many years before. (i) But it is otherwise when his income has decreased without any fault on his part. (j) The arrears of alimony ought to be enforced from year to year, for after greater delay the Ecclesiastical Court will not in general assist. (k) In a late case the executors of the will of a married lady filed a bill in the Vice-Chancellor's Court against the husband to compel him to pay the arrears of alimony, and the defendant demurred; and the Vice-Chancellor, after taking time to consider, inclined to be of opinion that the Ecclesiastical Court, notwithstanding the death of the wife, possessed the power of enforcing payment of the arrears of the alimony, and that, therefore, the bill in equity was unnecessary; but that being in a state of doubt on the subject, he would not go the length of saying that the bill could not be sustained, and therefore overruled the demurrer, reserving the consideration of costs until it had been decided whether the Ecclesiastical Court had or had not jurisdiction in the case. (l) In all suits of nullity of marriage brought by or on the part of the husband, the wife *de facto* is regularly entitled as well to alimony pending suit as to payment of all such costs as she incurs in her defence. (m).

3. Testamentary
causes. (n)

Thirdly, *Testamentary Causes*. The Ecclesiastical Courts, and especially the Consistorial and Prerogative Courts, have original, and in some cases, *exclusive* jurisdiction upon questions regarding the *validity* of wills relating to *personalty*; and we have seen that a Court of Equity has no jurisdiction to determine on the *validity* of a will, (o) the granting of probate or letters of administration, and taking and assigning administration bonds, (p) though afterwards the action for a breach of the condition is to be brought in a temporal Court. And if one of these Courts has granted probate, the validity of the will

(h) *Brown v. Brown*, 2 Hagg. R. 5.

(i) *Neil v. Neil*, 4 Hagg. 273.

(j) *Cox v. Cox*, 3 Addams, 276.

(k) *De Blaquere v. De Blaquere*, and *Wilson v. Wilson*, 3 Hagg. Eccle. Cas. 322, 329, n. (c).

(l) *Stones v. Cox*, Vice-Chancellor's Court, 25th and 27th June, 1834; Sir E. Sugden for plaintiff, Knight for defendant. Dower is not recoverable after death of widow, *White v. Parnter*, 1 Knapp's R. 226.

(m) *Portsmouth v. Portsmouth*, 3 Add. R. 63.

(n) See in general 3 Bla. Com. 95 to 99, and notes; Com. Dig. Prohibition, G. 16.

(o) *Ante*, 435; *Hughes v. Turner*, 4 Hagg. Eccle. R. 40, 41, n. (u), 48; *Jones v. Jones*, 3 Meriv. 161.

(p) 22 & 23 Car. 2, c. 10; 1 Madd. Chan. Pr. 626 to 628; *ante*, vol. i. 552, 716 a; *post*.

cannot be disputed if the testator be dead, at least in any *civil* proceeding, (although it may in a criminal prosecution,) until the probate has been set aside in the proper Ecclesiastical Court.(q) But the ecclesiastical judges admit that a Court of Equity is the fittest jurisdiction to decide upon the validity of an appointment in or by a will, and will therefore endeavour to put the question in a course of inquiry there;(r) and it is admitted that the Ecclesiastical Court has no authority to decree the execution of a trust.(s) It would be beyond our present object to enumerate when or not instruments in questionable form have been decreed to be valid testaments as regards *personal* property.(t) It has been held that written instructions for a will, taken down by an attorney from the deceased's dictation, and not signed by him, was a sufficient will;(u) and where a testator wrote a paper as his will, but left it incomplete for want of signature and attestation, which requisites he intended up to the time of his death to add, but was prevented from effecting by what is commonly termed the act of God, such paper was established as a will.(x) So an entry in an account-book, containing a full disposition of the property and appointment of executor, and dated eight months before the testator's death (which was sudden), and subscribed and carefully preserved, was pronounced for, though containing these words:—"I intend this as a sketch of my will, which I intend making on my return home."(y) And a will made by questions and even leading interrogatories, as, "do you mean to give your money at your bankers' to me?" and the testator thereupon verbally answered "yes," and the donee wrote such answer following the interrogatory, may be valid,(z) and a will or codicil in pencil is sufficient.(a)

But we have seen that Courts of Equity, whether Chancery or Exchequer, exercise a concurrent and more efficacious jurisdiction in compelling executors and administrators *to account* and distribute;(b) and the Court of Chancery has powers as extensive as those of the Court of Probate to receive evidence which may explain any *ambiguity* on the face of a will.(c)

(q) *Allen v. Dundas*, 3 T. R. 125; *Pinney v. Pinney*, 8 B. & C. 335; 1 Stark. Ev. 213.

(r) Per Sir John Nicholl, 4 Hagg. Ec. Cas. 47.

(s) *Hughes v. Hughes*, 4 Hagg. Ec. Cas. 49; *Ex parte Jenkins*, 1 B. & C. 655.

(t) See in general, *ante*, vol. i. 110, 111; 2 Bla. Com. 502, n. (16); and Williams's Law of Executors.

(u) *Huntington v. Huntington*, 2 Phil. Eccl. Cas. 213.

(x) *Scott v. Rhodes*, 1 Phil. Ec. Cas. 12.

(y) *Hallatt v. Hallatt*, 4 Hagg. R. 211.

(z) *Green v. Skipworth*, 1 Phil. Eccl. Cas. 58.

(a) *Rymer v. Clarkson*, 1 Phil. Ec. Cas. 22.

(b) *Sharpley v. Sharpley*, McCl. R. 506; *ante*, 423, 424, 435; 1 P. Wms. 514, 575, Com. Dig. Prohibition, G. 16; 3 Bla. Com. 25, n. (18); *ante*, vol. i. 112, 551, 552.

(c) 3 Phil. R. 480.

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One defect and want of adequate security in granting administration in the Ecclesiastical Courts is, that the two sureties required by the statute to execute the administration bond cannot be compelled to state the nature of their property, or where it is to be found; (*d*) though the parties interested in the fund may, by due attention, insist on sufficient sureties *justifying* generally, as the statute requires two or more *able* sureties. (*e*)

Where there has been no witness to a will, probate in the common form of an unattested will was granted on the affidavit of *one person only* to the testator's handwriting, and upon the consent of the sole person who would have been entitled to distribution if the testator had died intestate. (*f*) But mere similarity of handwriting will not suffice to prove the execution of an unattested will. (*g*) If a will once proved to have existed be not forthcoming, the presumption of law is, that the *testator* himself destroyed it, and therefore a copy will not be admitted to probate. (*h*)

Legacies. (*i*)

The Ecclesiastical Courts have proper jurisdiction over *personal legacies* charged upon or to be paid out of mere *personal* estate; (*k*) and upon the construction of a will respecting the same, as whether a bequest "to each of my servants living with me at the time of my death £10," extended to a job coachman who had served her for a considerable time. (*l*)

But an injunction may be granted in Chancery to restrain a husband's suit in the Ecclesiastical Court for a legacy to his wife, he not having made a settlement. (*m*) So when there is a *trust* affecting a legacy, Chancery will interfere; (*n*) but where an executor has no trust to execute, excepting that of merely *paying* the legacy, or where the purposes of a trust have expired, then the Ecclesiastical Court has jurisdiction. (*o*) When the estate of the deceased is considerable, or the legacy large, a suit in Chancery or the Exchequer, against the executor, may be more effectual to secure the fund and a due distribution than any suit in the Ecclesiastical Court; (*p*) but when the

(*d*) 22 & 23 Car. 2, c. 10; 2 Phil. R. 280. See observations in *Derey v. Edwards*, 3 Addams' R. 78; *post*, 502.

(*e*) 22 & 23 Car. 2, c. 10, s. 1, *post*.

(*f*) *In re goods of Mary Keeton*, 4 Hagg. R. 1.

(*g*) *Rutherford v. Maule*, 4 Hagg. 224.

(*h*) *Wargelt v. Hollings*, 4 Hagg. 245.

(*i*) See in general *Grignion v. Grignion*, 1 Hagg. R. 537; *post*, 498.

(*k*) *Bassett v. Bassett*, 3 Atk. 297; *Reynish v. Martin*, *id.* 333; 3 Hagg. R. 161, in note; *aliter*, if charged on *realty*, *ante*, 465, (*s*).

(*l*) *Howard v. Wilson*, 1 Hagg. Eccle. R. 107.

(*m*) *Meals v. Meals*, Dick. 373; 1 Atk. 491. In the Ecclesiastical Court a wife may sue *alone* the executor for a legacy given to her separate use, see *Capel v. Roberts*, 3 Hagg. R. 161, in note.

(*n*) 1 Atk. 491; *Grignion v. Grignion*, 1 Hagg. 535; *ante*, 465, (*s*).

(*o*) *Grignion v. Grignion*, 1 Hagg. R. 535, where see the whole law on the subject of this ecclesiastical jurisdiction.

(*p*) *Sharples v. Sharples*, McClell. Rep. 506.

legacy is small, it is in general most judicious for a legatee to institute a suit against the executor in the Arches Court, when the will has been proved in the Prerogative Court of Canterbury. (q) The simple mode pursued in the Ecclesiastical Court of enforcing payment of a legacy, as observed by Dr. Haggard, and presently stated fully, is very convenient and summary, and avoids the necessity for resorting to Chancery, and though but little known should be constantly resorted to, especially when the legacy is small. (r) This jurisdiction is exercised by the Arches Court in cases of all wills proved in the Prerogative Court, and by the official principals of each diocese in cases of wills proved in a Diocesan Court; and the course of proceeding in the Arches Court is there prescribed, and which will presently be stated. (s) In a recent case a suit of subtraction of legacy of so small a sum as 10*l.* was instituted in the Arches Court and the executrix condemned, with full costs and censure, for resisting and occasioning so much expense. (t) But in some cases the legatee should be prepared to give security to refund, where there is a possibility of creditors appearing. (u) An executor, after the lapse of a year, may even at any distance of time be called upon and sued in the Ecclesiastical Court, so as to compel him to pay a legacy upon condition that the legatee give security to refund in case the amount of his legacy should be required in discharge of debts. (x) Where a legacy has been given to the separate use of the wife in exclusion of the husband's interference, the suit is to be instituted in her *name separately* against the executor, and the husband or his assignee is only to be cited *pro forma*. (y) When an executor or administrator has expressly promised to pay a legacy in consideration of forbearance, and has assets, then we have seen that in general an action at law may be sustained, but not otherwise. (z)

4thly. *Suits for Defamation* are frequently instituted in the Ecclesiastical Courts, but as no damages are there recoverable and there is no penance excepting compulsory admission of the complainant's innocence, asking forgiveness, and payment of costs, there is not much inducement to sue. (a) In case

4. Defamation. (a)

(q) See an instance *Norris v. Hemingway*, 1 Hagg. R. 1, *post*, 498.

(r) *Capel v. Roberts*, 3 Hagg. R. 161, n. (a); see *post*, 498, *Arches Court*.

(s) *Id. ibid.* and see *post*, 498, *Arches Court*.

(t) *Howard v. Wilson*, 4 Hagg. R. 107.

(u) *Higgins v. Higgins*, 4 Hagg. 241.

(v) Per Sir J. Nicholl, *Higgins v.*

Higgins, 4 Hagg. R. 244.

(y) *Capel v. Roberts*, 3 Hagg. Ecc. Rep. 161, in note, and *post*, 498, *Arches Court*.

(z) *Ante*, vol. i. 550, 551.

(a) Burn's *Ecc. L.* Defamation; Com. Dig. Prohibition, G. 11; Bac. Ab. Slander, T. U.; Starkie on Slander, 32, 474. See form of citation and libel for defamation, *post*, 486, 487.

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of *verbal* slander, when the opprobrious words merely imputed an immorality punishable only in the Ecclesiastical Court, as calling a woman a *whore* or *bawd* or less explicit charge of fornication, if no special damage can be proved, a suit in the Spiritual Court is the only remedy, and in many cases it may with propriety be resorted to; and as regards personal considerations the humiliating sentence of an Ecclesiastical Court, compelling such admission of innocence and apology and payment of costs, may afford some degree of satisfaction to the insulted individual. Actions at *law* for *slander* are of more frequent occurrence, but unless attended with very aggravating circumstances are there sometimes treated with ridicule; we have ventured to suggest that they ought not to be discouraged, at least in cases when, if redress be denied, the party calumniated might be induced to revenge himself; (b) but there is no remedy at *law* for *verbal* slander, merely imputing some ecclesiastical or spiritual offence, as fornication. (c) The remedy in the Ecclesiastical Court for slander is limited to six calendar months. (d) The *verbally* calling a person heretic, adulterer, fornicator, whore, drunkard, &c. may be prosecuted in an Ecclesiastical Court; but if the words were coupled with others for which an action at law would lie, as calling a woman a whore and a thief, or "she keeps a bawdy house," which is an *indictable* offence, then the Ecclesiastical Court has no jurisdiction, and a prohibition lies, the rule being *mere spiritualia sunt quæ non habent mixturam temporalium*. (e) And a prohibition lies to a Spiritual Court to stay proceedings for calling a woman a whore in *London* or *Bristol*, on affidavit of the custom in those places giving an action in the local Courts there for that imputation. (f) But if part of the words impute only a spiritual offence, then after sentence a prohibition will not be issued to the Spiritual Court, although other words were actionable at law; as imputing to a woman that she was a whore and had given several men the bad disorder. (g) The Ecclesiastical Court has not jurisdiction unless the defamation imputed to the plaintiff the guilt of some offence punishable in that Court; thus to call a person "a common swearer" is not actionable, because the modern doctrine is that cursing and swearing are not

(b) *Ante*, vol. i. 23 a, n. (b).(c) *Ante*, vol. i. 13.

(d) 27 G. 3, c. 44, s. 1, 2.

(e) 2 Inst. 488; 2 Rol. Ab. 293, 297; 1 Sid. 404; 2 Ld. Raym. 809, 1101; 3 Mod. 74; 2 Salk. 552; *Crompton v. Butler*, 1 Hogg. Consist. Rep. 465 in

notes; post, 477, (e).

(f) *Brant v. Roberts*, 4 Burr. 2418; *Keyer v. Eastwick*, 4 Burr. 2032; *Power v. Shaw*, 1 Wils. 62.(g) *Semble*, *Carlsake v. Mappledoram*, 2 T. R. 473.

offences punishable in the Ecclesiastical Court. (h) Nor can a suit be instituted in the Ecclesiastical Court for a *written libel*, because any slander reduced into *writing* is remediable at law. (i)

It seems that in this Court not only a party guilty of speaking specific words, importing a particular or general charge of some spiritual offence, may be prosecuted, but also a person guilty of maliciously using general opprobrious and uncharitable expressions, tending to destroy brotherly charity, may be sued; (k) such as "thou art a dishonest liver," or "thou art a liar or knave," or "thou art not to be trusted upon thy word or oath more than a dog;" and it is said that a libel in such a suit ought always to state as well the particular defamatory words as also general terms of reproach, because the party might recover upon the latter in case the former should not be proved. (l)

In general, in a suit for defamation in a Spiritual Court, some slanderous words must be proved by *two* witnesses; but it is not essential that they should both speak precisely to the identical words in the same terms; nor is it necessary that the name of the complainant has been used, provided it appear from the same or other words who was the party intended to be calumniated, (m) and it seems sufficient if one witness prove defamatory words uttered at one time, and another witness at another; (n) or in other words, one witness to the fact and one to the circumstances is sufficient. (o)

In the case of *Cole v. Corder*, in the Arches Court of Canterbury, upon an appeal from the Commissary Court of Surrey, (p) Sir John Nicholl observed, "It is sometimes said that suits of this kind are to be discouraged by the Courts; and when suits arise between persons of the *lowest description*, the Court may lament that the parties should incur a ruinous expense; but it is necessary that the law should interpose to prevent the effects of malevolence: and the law gives no remedy in this case but by an application to this Court. In the

(h) *Harris v. Butler*, Arches Court, 1 Dec. 1798, referred to in note † to *Crompton v. Butler*, 1 Hagg. Cons. Rep. 463.

(i) *R. v. Curl*, Str. 790; No. 627; Comb. 71; Bac. Ab. Courts Ecclesiastical, D.; Burn, Ecc. L. tit. Defamation, accord. In *Ware v. Johnson*, 2 Lec. Ecc. Cas. 103, A.D. 1755, it seems to have been reported otherwise, and that for this writing, "I do certify that E. J. keeps a whore in his house," might be proceeded for in the Ecclesiastical Court; but note there was also in that case *distinct verbal* slander to the same effect, and which would sustain the suit in that case. Besides that case

was decided long before the case of *Thorley v. Kerry*, 4 Taunt. Rep. 355, and other cases, which establish that any calumnious charge in writing is now actionable.

(k) *Ante*, vol. i. 44, 45; Oughton.

(l) Oughton, 46, 47.

(m) *Crompton v. Butler*, 1 Hagg. Cons. Rep. 468; *Cole v. Corder*, *Smith v. Watkins*, *ibid.* 467; 2 Phil. Rep. 106.

(n) *Crompton v. Butler*, 1 Hagg. Cons. Rep. 460, 463.

(o) *Hutchins v. Denziloe*, 1 Hagg. Cons. Rep. 182.

(p) *Cole v. Corder*, 2 Phil. Ecc. Cas. 109.

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present instance the parties are in the *middling rank* of life; and it is necessary that there should be a remedy for a real injury;" and Sir John Nicholl said, that although the suit in the Commissary Court of Surrey for calling the plaintiff a common whore, had been dismissed with costs, the superior Court was not reluctant to apply the remedy which the law enjoined, and he reversed the sentence of the Court below, and pronounced the libel proved, and condemned the defendant with costs in both Courts. And in a subsequent case in the Arches Court, on appeal from the Consistory Court of Exeter, (q) the same learned judge observed, "I cannot agree that suits of this description between persons in the higher classes of society ought to be discouraged and less attended to than suits of a similar description between persons in a low condition of life; on the contrary, in the higher classes of society, acquiescence would be almost an admission of the charge; and as in those classes female reputation is of a higher importance and value to the person who possesses it, if an attempt be made to rob any one of that reputation, there is no other remedy but a reference to this Court, in which the law and constitution of the country have placed the cognizance of such offences; and the defamatory words having been, '*Ayre's sister was publicly kept by a man at Plymouth, and had a child by him,*' the sentence of the Consistory Court was affirmed with costs." (r) And in another case, where, after sentence, the defendant had appealed, and had in his original notice given to the complainant of the time of performing penance, subscribed himself "your's affectionately," Sir John Nicholl decreed that he should perform penance again, because the notice was given in an insulting manner, observing, that if an injury to an individual has been done, or the law has been violated, the most honourable and creditable mode is to make the amends which the law requires; such amends being due to society, whatever may be the private feelings and opinions of the party towards his adversary. (s)

But in a suit of this nature the Spiritual Court is bound to allow the defendant the advantage of any *justification* which would have availed him at common law, as a plea *that the words were true*. (t) There is this peculiarity, that in the Ecclesiastical Courts a woman may sue alone without her husband for

(q) *Tucker v. Ayre*, 3 Phil. Ecc. Cas. 539.

(r) Per Sir John Nicholl, in *Tucker v. Ayre*, 3 Phil. Rep. 539 to 542.

(s) *Courtail v. Ilmfray*, 2 Hagg. Ecc.

Rep. 4, 5.

(t) Com. Dig. Prohibition, G. 14; Cro. J. 625; 2 Rol. Rep. 82; Starkie on Slander, 481; Burn's Ecc. L. Defamation, 10, 11.

defamation, and though he might release the *costs*, yet he could not determine the suit, so as to release the defendant from the necessity of performing the enjoined penance; (u) and indeed where there was a libel in the Spiritual Court in the name of husband and wife, for calling the former cuckold, Lord Holt directed a prohibition, because they cannot both join in that Court for such words, but the wife should have sued alone, the imputation being only upon her, and the husband and wife by the law spiritual may not join in a suit in the Ecclesiastical Court as they must in the temporal, but each shall sue separately upon their own cause of action. (x) The statute 27 G. 3, c. 44, s. 1, limits suits for defamatory words to six calendar months. (y)

The *punishment* for defamation is payment of *costs* and *penance* enjoined at the discretion of the judge. If the slander was *privately* uttered, the penance may be directed to be performed in a private place; but if *publicly* uttered, then the penance is to be public, as in the church of the parish where the party defamed resides, in time of divine service, (but not covered with linen garments, as in cases of correction for fornication, &c.) and the defamer may be required publicly to pronounce that by such words, naming them, as set forth in the sentence, he had defamed the plaintiff, and therefore that he begs pardon and forgiveness, first of God, and then of the party defamed, for his uttering such words. (z) In a recent case, the sentence of the Arches Court was, that the defendant should, after giving twenty-four notice at least thereof to Harriet, wife of C. C., repair in the day time to the *vestry room* of the parish church of ———, and there in the presence of the officiating *minister*, (a) and one of the churchwardens, (and who are to have the like notice,) and such other persons as the party complainant shall bring with her, audibly and distinctly make the following confession, viz. to the effect "that he had defamed Mrs. C., and that he asked her forgiveness, and that he would not again offend in the like manner." (b) In a late case, in the Practice Court of the King's Bench, a very learned judge, referring to the authority of the statute *Circumspecte Agatis*, (13 Ed. 1, stat. 4,) stated that the punishment of defa-

(u) Rol. Ab. 298; 10 Mod. 64; 3 Bulstr. 264; Stra. 576; Ld. Raym. 74.

(x) 3 Salk. 288.

(y) 27 G. 3, c. 44, s. 1; *Bowyer v. Ricketts*, 1 Hagg. Cons. R. 213, citing *Goldingay v. Hill*. It seems that before that statute the party had a year from the speaking of the words to join issue in such a suit.

(z) Clerks' Assist. 225; 1 Bright, 392; 3 Burn Ecc. L. Defamation, pl. 14.

(a) If a sentence be that the penance shall be performed in the presence of the *minister*, it must not then also be, "and during divine service, &c." *Courtail v. Homfray*, 2 Phil. Ecc. Cas. 4, *sed quare*.

(b) *Courtail v. Homfray*, 2 Hagg. Ec. Cas. 2, note (a), and *ibid.* 4.

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mation is to be enjoined at the discretion of the Ecclesiastical judge; and he held that a sentence that the defendant should, in the presence of the plaintiff, confess that he had scandalously abused her by saying that she was in the family way and had miscarried; and that he begged her forgiveness, and further to say, "*I believe her life and conversation to be sober, chaste and honest,*" was legal and sufficient. (c) The course and form of proceedings in a suit of this nature will presently be stated. (d)

5. Perturbation
or disturbance
of pews. (d)

5thly. Suits for *disturbance* (technically called *perturbation*) of pews or seats in a church or chapel are frequently the subjects of litigation in the Ecclesiastical Courts, and in such a suit every description of right to a pew or seat may arise and be discussed. But when the *legal right* is clear, an action on the *case* for the disturbance, or an action of *trespass*, if there has been an assault, may be preferable; (e) and in one case, where it appeared that the *temporal right* was the question, a prohibition was awarded, to prevent the continuance of a suit in the Spiritual Court for a disturbance in the church. (f) As a decree in the Ecclesiastical Court, even the Arches, respecting a pew, is not in all cases conclusive, and the decision there may be afterwards disputed in an action, it is obviously, when the *right* is in dispute, better to proceed at law. (g)

The right of *burial* in a particular vault or place we have seen is also sometimes a private claim discussed and determined in a Spiritual Court. (h)

Secondly, Jurisdiction over
certain public
matters and
over certain
offences.

Church rates.

The Ecclesiastical Courts have also considerable jurisdiction over *public matters* of a spiritual nature, as *church rates*, and over *ecclesiastical officers* and certain *offences* of a *spiritual* nature.

Church rates are *peculiarly* subject to the jurisdiction of the Ecclesiastical Courts; (i) and although the 53 G. 3, c. 127,

(c) Per Taunton, J. in *Birch v. Brown*, 1 Dowl. Pr. Rep. 395.

(d) *Post*, 486, 487.

(e) *Oughton*, 50; *Wyllie v. Mott*, 1 Hagg. Eccl. R. 28; *Rich v. Bushnell*, 4 Hagg. Eccl. Cas. 164; and see *Parham v. Templar*, 3 Phil. R. 223; a suit against a curate for *altering* a pew in the nave of the church, and certainly an unauthorised material alteration of a pew, may be the subject of a suit for perturbation, but a small alteration, not occasioning injury to any private right, may be made without a faculty, 3 Phil. Eccl. Cas. 525, 527; see *post*, 507, *Court of Faculty*.

(f) *Witcher v. Cheslam*, 1 Wils. 17; *Byerley v. Windus*, 5 B. & C. 1; 7 D. &

R. 564. But to sustain a prohibition the party applying must show by affidavit that he has a *prescriptive* right to the seat, *Stedman v. Hay*, Comyn's R. 368.

(g) *Cross v. Saller*, 3 T. R. 639.

(h) *Ante*, vol. i. 50, 51; and see many points, *Rich v. Bushnell*, 4 Hagg. Eccl. Cas. 164; *Kemp v. Wickes*, 3 Phil. Eccl. Cas. 264 to 306.

(i) 3 Bla. C. 92; 2 Ves. 451; 1 Atk. 289. The Court of Chancery will not be ancillary thereto, *Chit. Eq. Dig.* 591; *Degge*, 172; 4 Hagg. Eccl. Rep. 84; *Burn's Eccl. L.* and *Burn's J. tit. Church Rates*; see *Course of Proceeding for Subtraction of Church Rate*, *post*, 491, 492.

gives justices of the peace jurisdiction to enforce payment when the arrear of rates does not exceed 10*l.* yet at the same time it expressly enacts that the justices shall not proceed when the rate is in a course of litigation in the Ecclesiastical Court; and if for the first time it be *bona fide* insisted before justices that the liability to pay is *intended* to be disputed in that Court they cannot proceed further. (i) Some questions upon *church rates* are difficult and require great consideration. (k) There is much contradiction in the books upon this subject. The proper course when a rate is essential in order to repair the church, is for the churchwardens to call a vestry, and it is for the majority of the parishioners at such vestry to say whether they acquiesce in the rate proposed and what rate shall be assessed. (l) The right to tax themselves is vested *exclusively* in the majority and no Ecclesiastical Court can assess a *quantum*. (m) If the majority of the parishioners refuse to make a rate, still the churchwardens themselves cannot make one, and the solitary decision that they can is not law. (n) If the parishioners contumaciously, obstinately and pertinaciously refuse to make any rate at all when it is necessary, or will only make such a rate as is manifestly collusive, then they may be articted in the Ecclesiastical Court for such refusal and there punished; (o) but where a rate of 11*l.* was required, and the majority of parishioners would not assent to a rate for more than 50*l.* 17*s.* and two of the churchwardens exhibited articles against the two other churchwardens and ten parishioners, a decree rejecting the articles was affirmed with costs. (p) By the general law it seems that the duty to repair a *chancel* is not to fall upon parishioners (except in London), but by special custom, the parishioners elsewhere may be liable. (q)

After a rate has been made, the formal and strictly proper course is for the churchwardens to apply to the ordinary to *confirm* the rate; (r) but a rate is valid without confirma-

(i) 5 Maule & Selw. 248; but see *R. v. Wrottesley*, 1 B. & Adol. 648.

(k) See 4 Hagg. Eccl. Cas. 84 to 107; *Smith v. Keats*, 4 Hagg. R. 278; *Greenwood v. Greaves*, *id.* 77; *Lambert v. Weal*, *id.* 96, 102; *Watney v. Lambert*, *id.* 84.

(l) *Jeffrey's case*, 5 Coke, 66; *Prideaux*, 48; Bac. Ab. tit. Churchwardens, C.; *R. v. St. Margaret's, Westminster*, 4 M. & S. 250; *R. v. St. Peter's, Thetford*, 5 T. R. 364.

(m) *Rogers v. Duvencant*, 1 Mod. 194, 236, neither on appeal nor otherwise; and see further in *Greenwood v. Greaves*, 4 Hagg. Eccl. Cas. 82.

(n) *Pierce v. Prowse*, 1 Salk. 166;

Groves v. Hornsey, 1 Hagg. Consist. Rep. 191; Bac. Ab. Churchwarden, C.; *Burn's Eccl. Law*, tit. Church, s. 6; see observations in *Greenwood v. Greaves*, 4 Hagg. Eccl. R. 83; overruling *Thursfield v. Jones*, 1 Ventris, 367, which is, however, copied into Degge, Prideaux and Anderdon.

(o) See authorities cited in *Greenwood v. Greaves*, 4 Hagg. Eccl. Cas. 80; and judgment of the Court, *id.* 82, 83.

(p) *Greenwood v. Greaves*, 4 Hagg. Eccl. Cas. 77.

(q) *The Bishop of Ely v. Gibbons*, 4 Hagg. Eccl. Cas. 156.

(r) Per Sir J. Nicholl in *Lee v. Culcraft*, 3 Phill. Eccl. Cas. 648.

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tion. (s) Sir John Nicholl observed, "if a rate-payer is dissatisfied with his assessment he should appear at the vestry and object to it; if his objections there are in vain his remedy is twofold, first, by entering a caveat against the confirmation of the rate, for in that case he becomes in the nature of a defendant, and the churchwardens are the parties applying for the confirmation; secondly, by refusing payment. In either case if he can make out that he has been over-assessed, he will be relieved. But one individual rate-payer not appearing at vestry to object to a rate being made, on the ground that it is for an *illegal purpose*, nor that the vestry has not been *legally called*, nor that the *assessment* has been unequally made, nor on any ground going to the invalidity of the *whole* rate, nor objecting that his own property is assessed above its true value, nor that of the whole sum to be raised by the rate he will have to pay more than his just proportion, cannot afterwards adopt proceedings to invalidate the *whole* rate; and Sir J. Nicholl observed, "Can one individual rate-payer thus lie by, and then come to this (the Arches) Court and pray that the whole rate may be quashed, because he offers to allege and shew that the value of the properties of a few individuals is greater in proportion to the assessments than the properties of other individuals? Even in a cause in the Ecclesiastical Court against a rate-payer of subtraction of rate, he ought to be confined to shewing either that the rate was illegally made, or that his assessment was too high and beyond his just proportion of the whole rate. (t) It was, therefore, decided that the Ecclesiastical Court has not jurisdiction upon an original proceeding by an individual rate-payer to set aside a rate on the ground of inequality in the assessment; the proper remedy for the party *unequally assessed* is to enter a *caveat* against the confirmation or to refuse payment of the rate, and thus compel the churchwardens to make him a defendant in a suit of subtraction of rate, upon which he may obtain a reduction. (u) This explains the object of the enactment in the 53 G. 3, c. 127, suspending the power of justices to levy a rate when it is bona fide to be contested in the Ecclesiastical Court. (x)

In a *suit of subtraction of church rate*, brought by the churchwardens against a parishioner, the presumption is in favour of the rate, and unless he establishes that he is unequally

(s) *Knight v. Gloyne*, 3 Add. 53; and per Sir J. Nicholl, 4 Hagg. Ecc. R. 290.

(t) Per Sir John Nicholl in *Watney v. Lambert*, 4 Hagg. Ecc. Cas. 87, 88.

(u) *Watney v. Lambert*, 4 Hagg. Ecc. Cas. 84.

(x) *Ante*, 472, 473; 5 M. & S. 248; *R. v. Wrottesley*, 1 B. & Adol. 648.

assessed, he will in general be condemned as well to pay the amount of the assessment as also the costs, and the resistance by a single individual of such rates are generally treated as vexatious, because they occasion great trouble and difficulty in a parish. (y)

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Spiritual Courts also have jurisdiction over *grammar schools*, but in case of a libel for teaching school generally, without saying *what* school, the temporal Courts will grant a prohibition. (z)

Grammar schools.

The Ecclesiastical Courts have jurisdiction over *officers of an ecclesiastical nature* to compel them to perform their duty; and they have jurisdiction over all *offences* and injuries strictly of a *spiritual* nature. Thus the Spiritual Court may compel *churchwardens* to deliver their account, though they cannot decide on the propriety of the charges therein; and, therefore, if that Court should take any step against a churchwarden after he has delivered in his account, it would be an excess of jurisdiction, for which a prohibition would be granted, even after sentence. (a) So if a *clergyman* of the church of England refuse or neglect to perform the office of burying when he ought, (as for instance a deceased *dissenter*,) he may be suspended for three months by the ordinary, (b) or he may be punished in the temporal Courts by indictment or information, if any inconvenience to the public should arise from the neglect. (c)

Ecclesiastical officers, as churchwardens, ministers, &c.

The statute 5 Eliz. c. 23, s. 13, specifies some of the *ecclesiastical offences* punishable in the Spiritual Courts, and which are thereby required to be specified in the *significavit*, such as heresy, refusing to have a child baptized, or to receive the sacrament, or to attend divine service, or error in matter of religion, incontinency, usury, simony, perjury in the Ecclesiastical Court, or idolatry. So in Oughton's *Ordo Judicorum*, many of the offences punishable in the Spiritual Courts are enumerated, (d) as *perjury* in an ecclesiastical suit; and which, it seems, may be canonically punished for the good of the soul, as the judge may think fit; (e) but when the wilful mistatement constitutes perjury or false swearing, as in obtaining letters of administration, it is more usual to indict in the criminal Courts; or if se-

Ecclesiastical offences.

(y) *Lambert v. Weall*, 4 Hagg. Ecc. Cas. 102; where see several points as to the mode of rating; and see *Smith v. Keats*, id. 275, as to several points.

(z) *Cox's case*, 1 P. Wms. 29.

(a) *Leman v. Goulty*, 3 T. R. 3; *Catchside v. Ovington*, 3 Burr. 1922; *Nutkins v. Robinson*, Bunb. 247; *Snowden v. Herring*, id. 289.

(b) *Andrews v. Cawthorne*, Willes, 538; *Kemp v. Wickes*, 3 Phil. Ec. C. 264 to 306.

(c) *Id. ib.*; ante, vol. i. 50, 51.

(d) Oughton, translated by Law; Clerks' Assistant; Consett on Courts.

(e) Oughton, by Law, 42; Bac. Ab. Prohibition, L. 3; Jenk. 184; Keilw. 39, pl. 5.

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veral have been concerned, then for conspiracy. (f) *Simony* also, whether the offender be a clergyman or layman, may be prosecuted in the Ecclesiastical Court; and it is said that the Ecclesiastical Court is more severe in cases of simony than the statute law. (g) *Usury* also, when beyond ten per cent., may be prosecuted in these Courts. (h)

Brawling, &c.

So by 5 & 6 Ed. 6, c. 4, s. 1, if any person shall by words only *quarrel, chide or brawl* in any church or churchyard, it shall be lawful unto the ordinary of the place, on proof by two lawful witnesses, to suspend every *ecclesiastical* person so offending, and every *layman*, from the entrance of the church; and if he be a clerk, from the ministration of his office, so long as the ordinary shall think fit, usually six months. And these acts being offences cognizable by Spiritual Courts at common law, the party may be proceeded against, either under the statute or at common law; (i) and proceedings in the Ecclesiastical Court for smiting or laying hands, or for brawling, will not be stayed by prohibition. (k) If the proceeding be on the statute, there must be two witnesses; (l) if at common law, then only one. (m) The second section of the same act relates to *striking* in a church or churchyard. Of late, proceedings for brawling have, in consequence of vestry disputes, been disgracefully frequent. (n) The statute was intended rather to secure the sanctity and dignity of the place than the party assailed or abused; (o) and indecorous words and conduct towards the presiding minister, at a vestry meeting, is an ecclesiastical offence; (p) and as the object of the law is to prevent irreverend conduct, the circumstance of the other party having used

(f) As recently in the case of *R. v. Jacobs*, for conspiracy to obtain a license to marry by false swearing that the party was of age. And in *R. v. Pennell and another*, for a conspiracy, by false swearing, to obtain letters of administration and defraud the East India Company, A. D. 1834.

(g) Oughton, by Law, 44; *Wheeler v. Hesse*, 3 Hagg. 659, 696; 3 Phil. R. 171, 174.

(h) Oughton, by Law, 44; 1 Hagg. Consist. R. 465, in notes.

(i) *Wentworth v. Collins*, 2 Ld. Raym. 850; *Newbery v. Goodwin*, 1 Phil. Ec. C. 282; *Jenkins v. Barrett*, 1 Hagg. Ec. C. 15; but the libel must charge that the railing and sowing discord was in the church, Bac. Ab. Prohibition, L. 3.

(k) *Wilson v. Greaves*, 1 Burr. 240; *Ex parte Williams*, 4 B. & C. 313; 6 D.

& R. 373.

(l) *Hutchins v. Densiloe*, 1 Hagg. Cons. R. 181.

(m) *Ibid.*

(n) See instances, Burn's Ecc. L. tit. Church x., note 3; and the most recent ecclesiastical reports, *Cox v. Goodhay*, 2 Hagg. Cons. R. 138; what is brawling, *Clenton v. Hatchard*, 1 Addams's R. 96; what not striking, 1 Hagg. Ec. C. 15.

(o) Oughton, by Law, 44; *North v. Dickson*, 1 Hagg. R. 730; *Jenkins v. Barrett*, id. 14; *Canning v. Sawkins*, 2 Phil. R. 293; *Daw v. Williams*, 2 Addams's R. 130, 136; *Williams v. Goodyer*, 2 Addams's R. 463; *Clinton v. Hatchard*, 1 Addams's R. 96; *Austen v. Dogger*, 3 Phil. R. 122.

(p) *Wilson v. M'Nath*, 3 Phil. R. 67, 89.

the most provoking language and conduct, affords no defence or excuse, for recrimination in this case is not tolerated. (q) In a suit for *Brawling*, under 5 & 6 Ed. 6, c. 4, s. 3, the words of brawling must be set forth in the articles, and the words "other enormous ecclesiastical offences," in a citation, are too general, and will not support a charge of smiting under that statute. (r) The sentence against a layman may be suspension *ab ingressu ecclesiæ* for a week, (s) or three weeks, (t) or a month, (u) or longer; with admonition and payment of costs generally, or 20*l.* or 35*l.*, or other fixed sum, usually less than the actual costs, *nomine expensurum*, (x) and a direction that the sentence shall be notified in church; (y) and in one case the sentence for smiting in a room, within the churchyard, was also *imprisonment* for twenty-four hours, (z) and it might be for any time not exceeding six months. (a)

Assaulting a clergyman is also an offence that may be proceeded for in the Ecclesiastical Court, and is punished by censure and costs, though not by the recovery of damages. (b) But the arresting a clergyman whilst performing or going to or returning from divine service, is now declared to be an indictable misdemeanor. (c)

The mother of a *bastard child* is punishable in these Courts, (d) and *adultery*, (e) *fornication*, (f) *lewdness*, *drunkenness*, (g)

(q) *Palmer v. Roffey*, 2 Addams's R. 141; *Palmer v. Sigmunt*, *id.* 196; *England v. Hurcomb*, *id.* 306; *Hutchins v. Denziloe*, 1 Hagg. Cons. R. 181; *Jarman v. Bagster*, 3 Hagg. Ec. C. 356; *North v. Dickson*, 1 Hagg. Ec. C. 730.

(r) *Jenkins v. Barrett*, 1 Hagg. Ec. C. 14.

(s) *Austen v. Dugger*, 3 Phil. Ec. C. 125.

(t) *Canning v. Sawkins*, 2 Phil. Ec. C. 293.

(u) *Field v. Cousens*, 3 Hagg. Ec. C. 178.

(x) *Jarman v. Bagster*, 3 Hagg. Ec. C. 360; *Jarman v. Wise*, *id.*

(y) *Canning v. Sawkins*, 2 Phil. Ec. C. 293.

(z) *Lee v. Mathews*, 3 Hagg. Ec. C. 169.

(a) See *post*, 484, n. (h); and 53 G. 3, c. 127, s. 3; *Hoil v. Scales*, 2 Hagg. Ec. C. 597; *Lee v. Mathews*, 3 Hagg. Ec. C. 169.

(b) *Oughton*, by Law, 44.

(c) 9 G. 4, c. 31, s. 23.

(d) 2 Atk. 673.

(e) In case of adultery the Temporal and Ecclesiastical Courts have concurrent jurisdiction, viz., an action at law, and

also ecclesiastical punishment; *Cro. Car.* 89; *Cro. J.* 538; *Jones*, 440; but where the party had been indicted for an *assault*, with intent to ravish, and convicted and fined, and then the husband brought trespass for assault and battery against him for the same offence, and which was pending; and then also libelled the party in the Ecclesiastical Court for *solicitation of chastity*, the King's Bench granted a prohibition, because as the attempt and solicitation to incontinence was coupled with force and violence, it became a *temporal crime in toto*, *Galizard v. Rigault*, 2 Salk. 552; 7 Mod. 79; 2 Ld. Raym. 809. Where there has been no violence, but unsuccessful *solicitation* of a wife, daughter or servant, a prosecution in the Ecclesiastical Court to compel the offender to perform penance seems a very proper proceeding.

(f) A clergyman may be suspended for three years for incontinency, *Watson v. Thorp*, 1 Phil. R. 269. A lewd woman, who has had a bastard, may be prosecuted in this Court, though under 7 Jac. 1, c. 4, she is to be sent to the house of correction, 7 Mod. 80.

(g) 1 Hagg. Cons. R. in note, 465.

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blasphemy and *absence* from Church, are all offences to be here prosecuted. (*h*) *Solicitation of chastity* may also be prosecuted in these Courts; though if a woman have previously indicted the party for an assault, with intent to ravish, and also sued him in an action of trespass vi et armis for assault and battery, it seems that such allegation of force, which is temporal, makes the whole cognizable by the temporal Courts; so that a prohibition against a proceeding in the Ecclesiastical Courts for the solicitation will issue; (*i*) and where solicitation of chastity has been successful, and followed by any temporal damage, as loss of service during the childbed to a master, or to a parent in the character of master, an action on the case for debauching the female, and consequent loss of service, has in effect abolished the remedy in the Ecclesiastical Courts. But where there has been a very culpable attempt to seduce, without conspiracy, between two or more persons, nor occasioning the loss of service, a suit in the Ecclesiastical Court for the solicitation is the only proceeding.

Limitation of
suits in Ecclesi-
astical Courts.

The 27 G. 3, c. 44, s. 1, we have seen requires suits in the Ecclesiastical Courts for defamatory words, to be commenced within six calendar months from the time they were spoken, and sect. 2, enacts that no suit shall be commenced in an Ecclesiastical Court for fornication or incontinence, or for striking or brawling in a church or churchyard, after eight calendar months. But a suit in the Ecclesiastical Court against a clergyman for incontinence, where the object is to obtain his suspension or deprivation, is not within that enactment, and therefore need not be commenced within the eight months. (*k*)

Circumstances
rendering it ex-
pedient to pre-
fer a proceeding
in the Eccle-
siastical Court.

In some respects a proceeding in the Ecclesiastical Courts is *preferable* to a Court of Law. Thus, although a party has been in custody more than a year, under a writ de contumace capiendo, in a suit in an Ecclesiastical Court for subtraction of tithes for less than 20*l.* and costs, he is not entitled to be discharged under 48 G. 3, c. 123, because he is not considered in prison under that act for a *debt* but for a *contempt*. (*l*)

When the Ec-
clesiastical
Courts have

When Ecclesiastical Courts have not Jurisdiction. The Ecclesiastical Courts have no jurisdiction over contracts or

(*h*) Oughton, by Law, 43.

(*i*) See ante, 477, note (*e*); *Galizard v. Rignault*, 2 Id. Raym. 809; *Gibs*. 1085; but see 1 Salk. 382; 2 Burn's Ecc. L. tit. Lewdness, 404.

(*k*) Ante, vol. i. 783; *Free v. Bur-*

goyne, 1 Dow's Rep. N. S. 115; 5 Bar. & Cres. 400; 8 Dowl. & Ry. 179; months in the Ecclesiastical Law and matters are always calendar; Bac. Ab. Prohibition, L.

(*l*) Ex parte *Kaye*, 1 B. & Adolp. 652

trespasses, as for breaking open a chest in a church, and taking away the title-deeds of the advowson; (n) and where a parson libelled the defendant in a Spiritual Court, for cutting elms in the church-yard and breaking a church wall, a prohibition was issued on a suggestion that the trees grew on the freehold of the parson: (o) and the ordinary cannot punish a trespass committed even in the body of the church, unless it hinder divine service. (p) Nor has a Spiritual Court any jurisdiction over *trusts* (if still subsisting); and therefore where a party, sued as a trustee, was arrested on a writ de contumace capiendo, the Court of King's Bench, on habeas corpus, discharged him out of custody. (q) And although this Court may compel a churchwarden, (r) or an executor, (s) to deliver his accounts, yet after the same, or an inventory by an executor, has been delivered, this Court cannot proceed to impeach the account. So a suit for defamation cannot be instituted in the Spiritual Court for a *written libel*, because any *written* slander of a person is actionable or indictable. (t) So these Courts have no jurisdiction over a devise of *real* property, or of a legacy or charge thereon. (u) Nor on the strict question of a right of way to remove tithe, though perhaps, collaterally, such a right might be tried. (x) But the rector, to avoid the necessity for such a suit, may remove the obstruction, (y) or may proceed in a temporal Court. (z) And although the Spiritual Court has in some cases jurisdiction over grammar schools, yet in case of a libel for teaching in a school generally, without license, and without showing what school, the temporal Courts will grant a prohibition. (a) And there is not any maxim in the law better established than that the Ecclesiastical Court has no jurisdiction in cases of treason or felony, or other of-

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not jurisdiction (m) either as respects the original suit or some matter afterwards arising.

(m) See in general Com. Dig. Prohibition, G.; Bac. Ab. Courts Ecclesiastical; Burn's Ecc. Law, tit. Courts; and see Harrison's Index, tit. Inferior Court, II. Prohibition.

(n) Fitz, N. B. 40; 4 T. R. 351; nor to try parish boundaries, because it involves prescription, Cro. Eliz.

(o) Ld. Raym. 212; Binsted v. Collins, Bunb. 229.

(p) Binsted v. Collins, Bunb. 229.

(q) R. v. Jenkins, 1 Bar. & Cres. 655; 3 Dowl. & Ry. 41, S. C.; 1 Atkyn, 491; and see fully Grignon v. Grignon, 1 Hagg. R. 535.

(r) Leman v. Goulty, 3 T. R. 3; Bun. 247, 289.

(s) Catchside v. Ovington, 3 Burr. 1922; Henderson v. French, 5 M. & S. 406.

(t) Ante, 469; Anon. Comb. 71; Bac. Ab. Courts, Ecc. D. and. tit. Prohibition, 3; Harrison's Index, tit. Inferior Court, II. Prohibition, 2.

(u) Barker v. May, 9 Bar. & Cres. 489; Bac. Ab. Prohibition, L. 2.

(x) Burnell v. Jenkins, 2 Phill. Rep. 398, 399; March. Rep. 45; Bulst. 67; Jones, 230; Bac. Ab. Prohibition, L.

(y) Id.; 2 Phil. Rep. 401.

(z) Cobb v. Selby, 2 New Rep. 466.

(a) Cox's case, 1 P. Wms. 29, Canon 77th; 2 Phill. Rep. 202, note (b); see fully Burn's Ecc. Law, tit. Schools; ante, 475.

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fence cognizable or punishable in the temporal Courts; (b) nor can *damages* be recovered in the Ecclesiastical Courts, but *costs* only. (c) Nor has the Ecclesiastical Court jurisdiction over cursing and swearing, nor over defamation, calling a person a common swearer. (d) Nor can these Courts try the existence of a *custom* or *modus*; and if they attempt to proceed in a cause where the *existence* of a *custom* or *prescription*, or of a *deed* is in issue, a prohibition from the Superior Court issues. (e) The *reason* is, that a judge and jury, proceeding according to the course of the common law, is a more competent tribunal for the trial of such questions of facts depending on prescription or custom, or the valid execution of a deed; and the circumstance of such a question arising between two ecclesiastical persons makes no difference, for even then the question must be determined at law, or a prohibition might issue; (e) but if the matter at issue be the existence of a mere ecclesiastical matter, and not a temporal right, as for instance, an *ecclesiastical* custom, then the question ought to be tried in the Spiritual Court, because fifty years (instead of sixty in Courts of law) make a custom by the ecclesiastical law, and therefore if the Courts of law were to judge of such a custom, they would be governed by a wrong rule. So, where the *right* to tithes is admitted, and the only question is, whether they are to be paid to the rector or the vicar, that question may be tried in the Spiritual Court, which is the reason that the common law Courts will not then grant a prohibition, and not as absurdly supposed by some, because both parties are ecclesiastics. (f) And although where a Spiritual Court hath jurisdiction of the principal cause, they may determine the accessory, they must, in so doing, proceed according to the rules of the common law, and therefore cannot legally require two wit-

(b) Examen of the Scheme of Chan. Pr. 90; and see Burn's Ecc. Law, tit. Courts, 50, note (m). But after conviction in a temporal Court the party may be proceeded against also in the Spiritual Court, if a spiritual person, in order to deprive him, though not for ecclesiastical punishment, Bac. Ab. Prohibition, L. 3; 2 Ld. Raym. 1506; and this even after six calendar months have expired, *Free v. Burgoyne*, 5 B. & Cres. 400; 8 D. & R. 179. The libel in such case is not to charge directly that the party was guilty of the offence, but merely that he had been convicted, &c. *ibid*.

(c) Watson, c. 30; 2 Burn's Ecc.

Law, tit. Courts, 50, 51.

(d) *Harris v. Butler*, Arches Court, 1 Dec. 1798; 1 Hagg. Consist. Court, Rep. 463, note f.

(e) *Vanacre v. Spleen*, Carth. 33; *Anon.*, 1 Vent. 274; *Anderson v. Davenport*, 1 B. & C. 86; *Cheesman v. Hoby*, Willes, 680; 3 Bla. Com. Dig. Prohibition; Burn's Ecc. Law, Prohibition. In *Johnson v. Oldham*, 1 Ld. Raym. 609; 12 Mod. 416, S. C., Lord Holt states the reason to be because Spiritual Courts have different rules respecting customs than the Temporal Courts.

(f) Per Willes, C. J. in *Cheesman v. Hoby*, Willes, 680; and see 3 Bla. Com. 89.

nesses, and if they do, a prohibition may be issued. (g) And an apparator, proctor, &c. cannot sue in the Spiritual Court for his fees. (h) Nor has an ecclesiastical judge any jurisdiction to compel a father to defend a suit there as guardian to his son, and where he assumed such jurisdiction and excommunicated the father for his refusal, it was decided at nisi prius by Lord Ellenborough, that an action on the case, was sustainable against the judge for such his illegal excommunication. (i)

But a question of jurisdiction ought not to be raised on a mere *motion*. (j) The rule seems to be, that "if it be clear that the Ecclesiastical Court has no jurisdiction, then the Court would itself stop without waiting for an injunction or prohibition, but if the point be at all doubtful, the Court would be bound to proceed; for to refuse the exercise of a jurisdiction which is competent to entertain the suit, and to which a party applies, would be a sort of denial of justice." (j)

Causes or suits which may be instituted in the Ecclesiastical Courts in respect of the different course of proceeding in each, are termed plenary or summary. *Plenary*, full or formal suits, are those in which the proceedings must be full and in formal order, (l) whilst the very term summary signifies that then the proceedings are less formal and more succinct. (m) When there is any doubt, the safest course is to proceed as in a plenary cause, for if the proceeding be improperly summary it would be void. (n)

The complaints that must be formally instituted and prosecuted, termed *plenary causes*, are the following: (o) —

1. All Testamentary Proceedings and businesses of Administration, unless in the Prerogative Court, where the proceedings are always summary, as by motion or petition.
2. All causes of Legacy.

(g) 12 Coke, 65; Hob. 188, 247; Marriot v. Marriot, 1 P. Wms. 12; 1 Stra. 672, S. C.; Freeman v. Shotton, 3 Salk. 288; Bac. Ab. Prohibition, L. 5.

(h) Pearson v. Campion, 2 Dougl. 629. See several cases and qualifications Bac. Ab. Prohibition, L. 1.

(i) Beaurain v. Scott, 3 Campb. 388.

(j) Per Sir John Nicholl in Grignon v. Grignon, 1 Hagg. R. 536.

(k) 2 Burn's Ec. L. tit. Courts, 48. In general old rules of practice consonant to reason and analogy, and not authoritatively altered, ought to continue to govern, Durant v. Durant, 1 Addam's R. 118, 123.

(l) Speaking of the then Ecclesiastical Courts, Bishop Burnett observes, "they have very little business, but they contrive to make the most thereof withal by introducing long recitals and otherwise, hence called *plenary*."

(m) Law's Oughton, 41, 42. So in Courts of Law and Equity the proceedings are by formal suit, or by a summary motion, as against their officers for gross professional misconduct, or to set aside warrants of attorney, annuity deeds, &c.

(n) Id. 60.

(o) Ordo Judicorum, Oughton, 59 to 61.

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3. Causes of Defamation, or reproachful or opprobrious Language. .

4. Causes of Divorce, or Separation from Bed and Board;
or

5. Jactitation of Marriage.

6. Impediments to Marriage.

7. Suits for Ecclesiastical Dilapidations.

8. Suits relating to Seats or Sitting-places in Churches; and

9. Suits for Tithes.

The practice in the principal of these suits will be hereafter fully considered, we are here principally examining the *extent of jurisdiction*.

Parties.

The suit may sometimes, even of necessity, be in the name of a married woman *alone*,^(o) as either for words defaming her,^(o) or for a legacy bequeathed to her for her separate use.^(p)

Process.

The *process* in the Ecclesiastical Courts is by *citation*, which differs from process in the Temporal or Equity Courts, and being for the enforcement of a moral or religious duty, may on that account be served on a Sunday.^(q)

Libel.

Instead of the declaration at common law or bill in equity, the statement of the complaint is termed a *libel*, and may, it is said, be less certain than a declaration at common law,^(r) but, on the other hand, it may in effect be more comprehensive; as in a suit for slander it is proper first to state the particular defamatory words, and then general words of reproach, and the complainant may recover in respect of the latter, though he fail as to the former.^(s) But in criminal suits, as in articles to be administered to a clergyman for the reformation of his manners and excesses, and more especially for adultery, fornication or incontinency, the articles must be so specific as to afford a fair opportunity of defence.^(t)

Answer.

The *plea* in this Court may be called the *answer*, and in which the defendant denies or extenuates,^(u) and if the suit be for slander, as calling a woman a whore, the defendant *may justify* that the words were true.^(x)

(o) 3 Salk. 288; 5 Mod. 69; Salk. 115; Ld. Raym. 73; 12 Mod. 891. And her husband cannot obtain a prohibition, *Tarrant v. Mawr*, 1 Stra. 576. After sentence of divorce the husband cannot release costs recovered by wife against a third person, Ld. Raym. 74.

(p) *Capel v. Roberts*, 3 Hagg. Ec. R. 161, in note.

(q) 5 Mod. 449; Carth. 504; Ld.

Raym. 706; 12 Mod. 275; 29 Car. 2, c. 7; 2 Burn's Ec. Law, tit. Courts, 48.

(r) 2 Rol. Ab. 298.

(s) Law's Oughton, 46, 47; see form of libel, *post*, 487, n.

(t) *Oliver v. Hobart*, 1 Hagg. Ec. Cas. 43.

(u) 3 Bla. Com. 100.

(x) *Ante*, 470.

If the defendant deny the charge, the complainant proceeds to proofs by *witnesses*, whose testimony is taken down in writing by an officer of the Court.(y) In an action for defamation and many other cases in the Ecclesiastical Court, the words must be *proved* by *two* witnesses, but they need not both swear to precisely the same words, or spoken at the same time.(z) The general principle upon which two witnesses have been required in the Ecclesiastical Court has been, that in regard to the commission of a crime the presumption in favour of innocence is considered as nearly equal to the oath of one witness, and that, therefore, to turn the scale against the party accused, there ought to be two witnesses to establish the charge. But the difficulties occasioned by this rule induced a modification in practice, and the consideration that one witness to the fact, and another to collateral corroborating circumstances, ought to be deemed sufficient, unless in cases where a statute requires the proof of the *same* fact by *two* witnesses.(a)

Witnesses.

As regards the sentence or judgment, an Ecclesiastical Court has no jurisdiction to award *damages*, but the punishment is only by enjoining the performance of *penance* and payment of costs, either generally or a named sum, or, as in a suit for restitution of conjugal rights, "*performance*" of the enjoined duty, and they cannot either fine or amerce.(b) But the penance enjoined in a *private* suit may be commuted or dispensed with for money paid to the complainant.(c)

Sentence.

The 53 G. 3, c. 127, in amelioration and aid of this otherwise imperfect jurisdiction, and in order the better to enforce observance of the sentence in cases of *private* injuries and *some smaller offences*, prohibits sentences of *excommunication* and writs of *excommunicatio capiendo*, but gives a new process, being an execution at law, called a writ *de contumace capiendo*, which, provided the sentence and proceedings be regular, in case of *continued disobedience*, operates as a perpetual imprisonment,(d) and the confinement under that writ is considered in the nature of an imprisonment for a *contempt*, and not for a *debt*; on which account, although the sum sentenced to be paid be under £20, and the party has been imprisoned upwards of a year, he is not entitled to his discharge under 48 G. 3, c. 123;(e)

(y) 3 Bla. Com. 100.

(z) 3 Bla. Com. 87, 88; *Cole v. Corder*, 2 Phil. R. 106; *Crompton v. Butler*, 1 Hagg. Cons. R. 463.(a) See observations in *Crompton v. Butler*, 1 Hagg. Cons. R. 461; and *Hutchins v. Denziloe*, *id.* 182.

(b) 11 Coke, 44 a; 5 Mod. 70; Hale's

Hist. C. L. 33.

(c) 5 Mod. 70.

(d) In a suit for brawling, sentence of imprisonment for seven days and payment of costs, *Hoiles v. Scales*, 2 Hagg. 597; and even six months' imprisonment, 53 G. 3, c. 127, s. 3.(e) *Ex parte Kaye*, 1 B. & Adol. 632.

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and if the party be already in custody of the marshal, he may be charged in such custody with the writ *de contumace capi-endo*. (f) However, a person imprisoned under a writ of *ex-communicato capi-endo*, or, as it should seem, *contumace capi-endo*, is entitled to the benefit of the rules of the King's Bench prison. (g) In a suit for brawling and smiting in a church or church-yard, there may be sentence of imprisonment, as for seven days, or not exceeding six months, with payment of costs. (h)

The sentence of an Ecclesiastical Court, if of a novel kind, ought not to issue without either the Court or a judge being consulted in *camera*, or moved in Court by counsel, because it is of consequence that the instruments of the Court should be strictly correct, they being generally presumed to be declaratory of the law of the Court. (i)

In case of *nonconformity* to the sentence of the Ecclesiastical Court, as upon a decree against a wife of restitution of conjugal rights, if the defendant disobey, she may be imprisoned under the statute 53 G. 3, c. 127, for the contempt at the instance of the complainant; and such imprisonment is not, as has been supposed, in the discretion or terminable at the pleasure of the ecclesiastical judge by whom the party has been pronounced in contempt, but at most he has jurisdiction, according to the facts, to release, on its being established that the party *has obeyed* the original sentence; (k) and without such *obedience*, the Court cannot, upon petition or otherwise, relieve from the imprisonment. (k) But we have seen that the imprisonment might be modified by removal into the prison of the Court of King's Bench, and then obtaining the benefit of the rules. (l)

But in the proceedings under the statute 53 G. 3. c. 127, it must clearly appear that the Ecclesiastical Court had jurisdiction, and that the form of proceedings has been duly observed; (m) and if such proceedings should be set aside, a new

(f) Per Bailey, 9 B. & C. 67.

(g) *Id. ibid.*; and *Rex v. Bricklas*, 1 Stra. 413. Consequently if a party be imprisoned in such a case in a county prison, he might be removed into the King's Bench prison, and then obtain the benefit of the rules.

(h) *Hoile v. Scales*, 2 Hagg. Ec. Cas. 397; 53 G. 3, c. 127, s. 3; *Lee v. Matthew*, 3 Hagg. 169; *Field v. Cousens*, *id.* 178; *Jarman v. Bagster*, *id.* 356; *Jarman v. Wise*, *id.* 360.

(i) Per Sir John Nicholl in *Elliott and Sugden v. Garr*, 2 Phil. R. 18.

(k) *Barlee v. Barlee*, 1 Addams, R. 301. In this case the wife afterwards indicted the husband and others for a conspiracy, but at Chelmsford assizes they were acquitted, the jury being satisfied that she was insane. See *supra* note (g), relative to obtaining the rules.

(l) *Supra*, n. (g).

(m) 5 B. & Ald. 791; 3 Dowl. & R. 57; *Austen v. Dagger*, 1 Add. R. 307; and MS. *Ex parte Mrs. Barlee*, K. B. Mich. T. 1824, cor. Bayley, Holroyd, and Littledale, J.'s, on the hearing of a rule at the house of Bayley, J. in Dec. 1824,

motion for the former costs may issue, (*n*) and the sentence must not be in general terms to do the "*usual penance*," however well its limits may be understood in the Ecclesiastical Court, but it must specify *what particular penance* shall be done, and for that defect in the sentence the party was discharged; (*o*) and where the warrant issued in pursuance of the writ de contumace capiendo stated, that the defendant was attached for non-payment of costs in a cause of appeal and complaint of nullity, lately depending in the Arches Court of Canterbury, it was held insufficient, in not stating with certainty the nature of the cause, so as to show it was sufficiently within ecclesiastical jurisdiction (*p*). But where it appeared in the significavit that the defendant was condemned in a cause of defamation and slander *merely spiritual*, this was holden sufficient. (*q*)

The course of practice of an Ecclesiastical Court is matter of fact to be proved by evidence; (*r*) or a certiorari may be issued to the judge of an inferior jurisdiction to return the practice of his Court. (*s*)

We have seen that in matrimonial causes a suit originally professing to have only one particular object may afterwards quite change that object; thus, a suit for jactitation of marriage may change and conclude with a sentence in favour of the defendant, of restitution of conjugal rights; and, on the other hand, a suit for resitution of conjugal rights may terminate in a decree of divorce, on account of the adultery of the complainant. (*t*).

There are some suits of more frequent occurrence in the Ecclesiastical Courts, the particular proceedings in which it is essential for all practitioners to be acquainted with, and which having been very attentively considered by one of the most eminent proctors practising in the Spiritual Courts, are here stated with the utmost confidence. These relate to suits for defamation—restitution of conjugal rights—nullity of marriage—divorce—subtraction of tithes and subtraction of church

The practical proceedings in certain suits of usual occurrence.

upon which Mrs. Barlee was discharged from imprisonment on sentence in a suit for restitution of conjugal rights. See other cases, Chitty's Col. Stat. 245 to 251, in notes.

(*n*) *Austen v. Dagger*, 1 Add. 307.

(*o*) *R. v. Maby*, 3 Dowl. & R. 570; Oughton, 304. The form of sentence on a decree of incestuous marriage, see 2

Phill. Rep. 362, note 6.

• (*p*) *R. v. Dagger*, 5 B. & Ald. 790; 1 Dowl. & R. 460.

(*q*) *R. v. Payton*, 7 T. R. 153.

(*r*) *Beaurain v. Scott*, 3 Campb. 388.

(*s*) *Williams v. Bagot*, 4 Dowl. & R. 315.

(*t*) *Ante*, 461.

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rates—the law relating to each of which we have already in a great measure considered.

Proceedings in
a suit for de-
famatory words.

The course to be adopted in instituting a suit for *Defamation* is, for the party complaining of the grievance to obtain a citation against the person speaking the offensive words. Upon the return of this citation into Court, after personal service on the defendant, and on appearance being given, a libel pleading the facts when, where, and by whom the words were spoken, and the jurisdiction of the Court, is given into Court, and upon its admission the defendant is called upon to give an affirmative or negative issue thereto. Should the words be admitted, that is, an affirmative issue be given, the defendant is enjoined to perform penance, and extract a certificate shewing that the sentence of the judge has been complied with. If however the defendant denies the truth of the averment in the libel, witnesses are examined in support of the facts pleaded, and in the event of no responsive plea being given by the defendant, (which he is at liberty to do,) publication of the evidence is decreed. An allegation, excepting to the credit or testimony of a witness or witnesses, if advisable, can be tendered, and the judge will admit the same, if the facts are sufficiently stringent, and the evidence of the witness excepted to forms a material part in support of the case; should this however be declined, the judge proceeds to hear the cause and pronounce sentence; presuming it to be in favour of the plaintiff, the defendant is enjoined to perform the penance, the same as if an affirmative issue had been given upon the admission of the libel. The forms of citation and libel in such a suit are stated in the note. (u).

Form of citation
in a suit for de-
famation.

(u) Y. Z. [*the name of the bishop,*] by divine permission, Bishop of London, to all and singular clerks and literate persons, whomsoever and wheresoever, in and throughout our whole diocese of London, greeting: We do hereby authorize, empower, and strictly enjoin and command you, jointly and severally, peremptorily to cite or cause to be cited C. D. of the parish of ———, in the county of Middlesex and diocese of London, to appear before the worshipful ———, doctor of laws, vicar-general and official principal of our Consistorial and Episcopal Court of London, lawfully constituted his surrogate, or some other competent judge in this behalf, in the common hall of Doctors' Commons, situate in the parish of St. Benedict, near Paul's Wharf, London, and place of judicature there, on the third day after he shall be personally served with this citation, if it be a Court day, otherwise on the Court day then next following, at the usual and accustomed hours for hearing causes and doing justice there, then and there to answer to A. B. of ——— in the parish of ———, in the county and diocese aforesaid, in a certain cause of defamation, and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said ———, and whatsoever you shall do or cause to be done in the premises you shall duly certify our vicar-general and official principal aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at London, the ——— day of ———, in the year of our Lord ———, and in the ——— year of our translation.

In a suit *for restitution of conjugal rights* a citation issues under the seal of the Ecclesiastical Court claiming jurisdiction, or a *decree* (by letters of request) from the Arches Court at the suit of the plaintiff, calling upon the defendant *to render conjugal rights*. Upon a personal service having been effected and the citation returned, and an *appearance* given, a *libel* is brought into Court, pleading that the parties being free from matrimonial engagements, *A. B.* paid his court in the way of marriage to *C. D.*; the marriage, when, where, and the entry

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Proceedings in
a suit for restitu-
tion of conju-
gal rights.

In the name of God, Amen. Before you the worshipful ———, doctor of laws, vicar-general of the Right Reverend Father in God ———, by divine permission, Lord Bishop of London and official principal of the Consistorial and Episcopal Court of London, lawfully constituted your surrogate, or any other competent judge in this behalf, the proctor of ———, of ———, in the parish of ———, in the county of Middlesex, and diocese of London, against ———, of the parish of ———, in the county and diocese aforesaid, and against any other person or persons lawfully intervening or appearing for him in judgment before you by way of complaint, and hereby complaining unto you in this behalf doth say, allege, and in law articulately propound as follows, to wit—

Form of *libel* in
Consistory
Court of Bishop
of London, in a
suit for defa-
matory words.

First,—That all and every person or persons who utter, publish, assert, or report, or shall have uttered, published, asserted, or reported reproachful, scandalous, or defamatory words, to the reproach, hurt, or diminution of the good name, fame, and reputation of any other persons, contrary to good manners and the bond of charity, are, and ought to be monished, constrained, and compelled to the reclaiming and retracting such reproachful, scandalous, and defamatory words, and to the restoring of the good name, fame, and reputation of the person thereby injured, and that for the future they refrain from uttering, publishing, and asserting or declaring any such reproachful, scandalous or defamatory words, and are and ought to be canonically corrected and punished; and this was and is true, public, and notorious.

Second,—That notwithstanding the premises mentioned in the next preceding article, the said ——— in the months of ———, ———, last past, or in some or one of those months, within the said parish of ———, in the county and diocese aforesaid, or in some other parish or public place in the neighbourhood thereof, or near thereunto, and within six calendar months from the commencement of this suit, in an angry and reproachful and invidious manner, several times, or at least once, in the presence and hearing of divers credible witnesses, did defame the said ———, who was and is a person of good reputation and character, and charged the said ——— with having committed the crime of fornication or incontinency, and speaking of and meaning and intending the said ———, the party agent in this cause, said, affirmed, and published several times, or at least once, these or the like words, to wit, ———, with many other defamatory words of the like nature, purport or effect, and the party proponent doth allege and propound every thing in this article contained jointly and severally.

Third,—That the said ——— hath oftentimes, or at least once since the affirming and speaking the defamatory and scandalous words mentioned in the next preceding article of this libel, owned and confessed that he spoke the said defamatory words as in the said next preceding article are set forth, and the party proponent doth allege and propound as before.

Fourth,—That by reason of speaking the said defamatory and scandalous words, the good name, fame, and reputation of the said ——— is very much hurt and injured amongst her neighbours, friends, acquaintance and others, and this was and is true, public, and notorious, and the party proponent doth allege and propound as before.

Fifth,—That the said ——— was and is of the parish of ———, in the county of Middlesex, and diocese of London, and therefore and by reason of the premises was and is subject to the jurisdiction of this Court, and the party proponent doth allege and propound as before.

Sixth,—That the said ———, the party agent in this cause, hath rightly and duly complained of the premises to you the vicar-general of the Right Reverend Father in God Charles James, by divine permission, Lord Bishop of London, and official principal of the Consistorial and Episcopal Court of London aforesaid, and to this Court, and the party proponent doth allege and propound as before.

Seventh,—That all and singular the premises were and are true, and so forth.

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thereof in the register book of the parish wherein they were married, a copy of which entry is annexed to the libel; the living and cohabiting together and passing as man and wife, and birth of children (if any); the ceasing and refusal of one of the parties to cohabit, and the jurisdiction of the Court; and concludes by praying that the marriage may be pronounced for, and the party offending render conjugal rights. The defendant as a *bar* may, by *responsive allegation*, plead cruelty or adultery (if the facts are so), and if either be established, the suit may, as we have seen, terminate in a decree of divorce. (x) But if no such answer be advanced, then, after the libel has been admitted, the defendant is required to give an answer thereto; should it be in the *affirmative*, the party offending is admonished and directed by the judge to render conjugal rights; should the answer however be in the negative, witnesses are examined, and upon publication of the evidence, and no allegation excepting to the testimony of any of them be given, the judge hears the cause and passes sentence; and, presuming such sentence to be favourable to the complaining party, he directs the defendant to render conjugal rights, and decrees a monition to issue to that effect; and if the defendant, after personal service of such monition, treat the order of the Court with contempt or neglect to conform, the judge, upon notice having been given to the defendant, will pronounce him contumacious, and direct such contempt to be *signified*; upon which, a writ *de contumace capiendo* for taking the defendant into custody issues from the Court of Chancery.

The *formal* part of the *citation* in this case is similar to the citation for defamation, and, in fact, in all cases it may be said to be the same, differing only in the facts of the grievance complained of.

Proceedings in
a suit for nullity
of marriage by
reason of undue
publication of
banns.

The proceedings against a party for *nullity of marriage* in consequence of undue publication of banns, are personally to serve a *decree* upon the defendant in the suit, and upon its return into Court a libel is given, and on its admission the defendant is called upon to give in an answer affirmative or negative; if the latter, witnesses are examined and the cause proceeds through its various stages until a definitive sentence be given.

The *libel* in this case pleads (or in other words recites) so much of the act of the 4 G. 4, as applies; the birth and baptism of the parties, and exhibits annexed to the libel, baptismal certificates; the courtship and marriage, *and of its being concerted be-*

tween the parties that the banns should be published in fictitious names, and that they were not baptized by such names, or known by them; the entry in the parish books of the publication of the banns and the identity of the parties, and a certificate of this entry is annexed to the libel, which also pleads the marriage of the parties in such assumed names and annexes a copy of the certificate of marriage, and that the signature to the original entry is in the handwriting of the parties; that the complaint is just, and the Court has jurisdiction to entertain the suit.

Suits for nullity of marriage by reason of incest are usually promoted at the instance of a party by virtue of the office of the judge, upon the party promovent entering into a bond to pay such costs and charges as the judge or his surrogate should allot in case of failure. A decree in this case is personally served, charging the defendant with being guilty of the foul crime of incest; upon the return of this decree and an appearance being given, or in event of nonappearance, a further decree, calling upon defendant to see proceedings is served, and if no notice be taken the suit proceeds, and articles are exhibited and admitted, pleading the marriage and cohabitation of the father and mother of *A. B.* and *C. D.* and annexes the certificate of such marriage, the birth and consanguinity or affinity of *A. B.* and *C. D.*, when and where they were baptized, annexes a copy of the certificate of such baptism, and further pleads the identity of the parties, the marriage of defendant with *A. B.*, living and cohabiting as man and wife and a copy of the certificate of marriage and identity, the death of *A. B.* and subsequently marrying *C. D.*, the marriage certificate, identity of parties, the committing of incest, jurisdiction of the Court, and prays that the judge do pronounce the marriage null and void, and that the defendant should be corrected.

Proceedings in a suit for nullity of marriage by reason of incest.

A citation or decree issues at the suit of the party complaining, calling upon the defendant to appear and shew cause why the plaintiff should not be divorced from bed, board, and mutual cohabitation, by reason of cruelty or adultery, as the case may be. The service of the process being effected and an appearance being given, a libel is brought in, and on its admission by the judge and the averments being denied by the defendant, witnesses are examined and publication of their evidences, and if there be no allegation excepting to them or any of their testimony the judge proceeds to hear the cause and give sentence. During the proceedings, the defendant can give in a responsive allegation recriminatory, and presuming both parties be proved to have been guilty of adultery the judge will dismiss the suit.

Proceedings in a suit for a divorce by reason of cruelty or adultery.

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Alimony is frequently directed to be paid to the wife during the dependence of the suit, and in order to determine the amount, an allegation of faculties, pleading the value of the husband's property and his annual income, and his answers on oath thereto, are given, and the judge then allots alimony, according to the facts to be gleaned from the plea and answer respecting the circumstances and means and situation in life of the parties.

The *libel* in this case pleads the courtship and marriage of the parties, their cohabiting and passing as man and wife, the birth of children (if any), the various acts of *adultery*, when, where, and with whom committed, or if *cruelty*, specifying the same and when and where; and also shews the jurisdiction of the Court, and concludes by praying the judge to pronounce the party to be divorced from bed, board, and mutual cohabitation.

In cases where proceedings have been previously had at common law and a judgment obtained against an adulterer, that fact is pleaded and a certified copy of the judgment is annexed.

Proceedings in
a suit for sub-
traction of
Tithes.

The *citation* in a suit for subtraction of *Tithe* issues at the instance of the party entitled to the tithes, calling upon the defendant to appear in a cause of subtraction of tithes; and upon personal service thereof, and an appearance being given, a *libel* in the subscribed form, with a schedule, is brought in; the latter very fully and specifically sets forth the various titheable articles belonging to the defendant. The proceedings are in this, similar to those in a cause of subtraction of church-rate in the next page.

Appeal therein
from diocesan to
Arches Court.

Presuming a cause of this kind to commence in a diocesan Court, and either party feel aggrieved at the mode of proceeding or decision given, the party complaining may *appeal to the Court of Arches*, upon which an *inhibition*, under the seal of the superior Court, is served upon the registrar of the Court below, and also on the opposite party, or his proctor. A *monition* also issues from the higher Court for the transmission of the various papers and proceedings given in and had in the lower Court. These documents, after the service has been effected, are *returned* into the Court of Arches, and upon an appearance being given for the respondent, a *libel of appeal* is given, which states when and before whom the suit was originally depending, complains of the grievance suffered by the appellant, of his having appealed to the higher tribunal, and the jurisdiction of the Court, and concludes by praying the judge to pronounce for the appeal. On the admission of this libel the respondent gives a negative issue thereto; and the process and all proceedings, &c. had in the Court below, being brought in, the judge

decrees publication of the evidence and proceeds to pronounce sentence. Should this be in favour of the appellant he retains the cause in the Arches Court until a final adjudication; if, however, he decides in favour of the respondent, the cause is remitted to the Court below, which again proceeds therein. The form of *citation and libel* in a suit of this nature will be found in the note.(x)

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A citation issues at the suit of the churchwardens, calling upon the defendant to appear in a cause of subtraction of

Proceedings in
a suit for sub-
traction of
Church-Rate.

(x) *A. B.* Clerk, Master of Arts, Official Principal of the Episcopal Court of Exeter, lawfully constituted, To all and singular clerks and literate persons lawfully appointed within the diocese of Exeter, greeting: We hereby charge and command you jointly and severally to cite, or cause to be cited, *A. B.* of —, in the county of — and diocese aforesaid, that he appear before us or our lawful surrogate, in the cathedral church of Saint Peter in Exeter in the Consistorial Court and place of judicature there, on — the — day of —, at the usual hour of hearing causes there, then and there to answer to the Reverend —, clerk, rector of the rectory and parish church of — aforesaid, in a cause of subtraction of tithes, and further to do and receive as unto law and justice shall appertain: And what you shall do herein you shall duly certify us at the time and place aforesaid, together with these presents. Given under seal of our office the — day of —, in the year of our lord.

Form of *citation*
in a suit for
subtraction of
tithes at instance
of rector in
Consistorial
Court of Exeter.

A. B. Actuary assd.

In the name of God, Amen. Before you the worshipful George Martin, Clerk, Master of Arts, Vicar-General, and Official Principal of the Episcopal Consistorial Court of Exeter, lawfully constituted your lawful surrogate or any other competent judge in this behalf. The party of —, clerk, rector of the rectory and parish church of —, in the county of — and diocese of Exeter, against —, of the parish of —, aforesaid, yeoman, and against any person appearing on his behalf, by way of complaint, doth say, allege, and propound, and articulately set forth as follows:

Form of *libel* in
a suit for sub-
traction of tithe
in Consistorial
Court Exeter.

First,—The party proponent doth say, allege, and propound that during the whole of the years — and —, and during the months of January, February, March, April, May, June, July, August and September, in the year —, the said — was and still is the lawful and rightful rector of the rectory and parish church of —, in the county of — and diocese of Exeter, and as such was and is entitled to all and singular the great and small tithes, oblations, obventions, profits, advantages, perquisites, dues, and emoluments to the said rectory and parish church belonging or in any wise appertaining, and so was and is generally accounted, reputed, and taken to be; And the party proponent doth allege and propound every thing in this and the several subsequent positions or articles contained jointly and severally, and for any other tithe, due, matter, time, or thing as shall hereafter appear from the confessions or proofs to be made in this cause.

Second,—Also the party proponent doth say, allege and propound that the said —, in the years libelled, in each or one of them within the tithable places of the said rectory and parish of —, libelled, had the several species of things mentioned in the schedule hereunto annexed, the tithes of which have been often or at least once demanded, and are now demanded by this suit on behalf of the said —, but the said — refused or neglected fairly and truly to set out and divide the tithes of such several species of things mentioned in the said schedule hereto annexed, so that the said — might see the same justly and fairly set forth and divided as by law he was entitled to do, and refused or neglected to give any account or accounts of other matters of tithes in the said schedule mentioned as by law he ought to have done, and refused or neglected and does refuse or neglect to yield, pay, or satisfy the tithes or value of the tithe of such several species of things so mentioned in the said schedule contrary to law and justice, and be allegeth for any other sort or species of tithes not mentioned or expressed in the said schedule.

Third,—Also the party proponent doth say, allege, and propound that the said —, was and is an inhabitant of the parish of — aforesaid, within the diocese of Exeter aforesaid, and subject to the jurisdiction of this Court.

Fourth,—And the party proponent doth further say, allege, and propound that all and singular the premises were and are true, and so forth:

Whereof proof being made, and so forth.

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church-rate. Upon the return of this citation into Court, after personal service has been effected, and on an *appearance* being given by defendant, a *libel* is brought in, pleading the church to have been in need of repairs, as also incidental charges belonging to churchwardens, the meeting of vestry agreeably to public notice, the making and confirming the rate and of many of the parishioners (if it be so) having paid, the copy of the rate or assessment so far as relates to the house or grounds of defendant, and that at the time of making the rate, and the repairs and disbursements, the defendant being a parishioner was duly and justly rated at (here the amount is set forth); it then pleads that the plaintiffs were churchwardens at the commencement of the suit, the application to and refusal of defendant to pay, the jurisdiction of the Court, and concludes by alleging the complaint to be duly made, and prays the judge to condemn the defendant in the rate as assessed. On the admission of this libel, the defendant has to give in his *answer* thereto on oath; witnesses are also examined in support thereof, and if occasion should require, the judge will direct a *monition* for the production of such of the parish books as may be considered necessary. The defendant may likewise give in a *responsive allegation*, which, if admitted, the churchwardens have to *answer* thereto on oath; witnesses can also be examined on this responsive plea, and allegations may be given excepting to their testimony, if requisite.

Of the right of
Intervention by
a third party in
an ecclesiastical
suit.

In some Courts a *third person*, not originally a party to the suit or proceeding, but claiming an interest in the subject-matter, may, in order the better to protect such interest, interpose his claim, which is a proceeding termed in the Ecclesiastical Courts *intervention*. In the Mayor's Court, London, a claim of a third person somewhat of this nature, and termed a bill of proof, may also be interposed. (y)

Intervention is unknown in our Courts of Law and Equity, but it is admitted in the practice of our Ecclesiastical Courts. (z) In *Dalrymple v. Dalrymple* (a) a party was allowed to intervene after an appeal from the Consistory Court to the Court of Arches; in that case the learned judge observed, "The prin-

(y) See post, and 3 Chitty's Commercial Law, 633. In the Mayor's Court, a bill of proof is unnecessary where the attachment could not possibly be sustained, see 1 Marsh. Rep. 233. But still it may be useful, so as to enable a party to watch and interpose in the conduct of the attachment and prevent collusion.

(z) Oughton's Ordo Judicorum, tit. 14; and Clerke Praxis Admiraltum, tit. 38, 39.

(a) 2 Hagg. Cons. Rep. 137; see also on the doctrine of intervention, *Marquis Donegal v. Chichester*, 3 Phill. 586; *Chichester v. Donegal*, 1 Addams, 5, 6; Madd. 375.

ciple of the law of intervention is, that if any third person consider that his interest will be affected by a cause which is depending, he is not bound to leave the care of his interest to either of the litigants, but has a right to *intervene* or be made a party to the cause, and take on himself the defence of his own rights, provided he does not disturb the order of the proceedings. The intervener may come in at any stage of the cause and even after judgment, if an appeal can be allowed against such a judgment. He may not know of the existence of the cause, or he may have no interest to interfere until he applies to intervene. The Orphan Board in that case were not interested in the matter in dispute until the decease of Mrs. Durr, and immediately after her death, they applied to intervene. It is immaterial in what state the cause is, if, at the time of the intervention, the proceedings are not deranged by it. In the Digest, L. 49, tit. 1, b. 5, it is laid down, that "no person is admitted to appeal against a sentence pronounced in a cause litigated between other parties except for some just cause, as when one suffers himself to be condemned in a cause to the prejudice of his co-heirs, or in any other case of the like kind." Many other cases are mentioned in this law, in which a third party has a right to intervene. They are only put as examples, the rule which they establish extending, according to the words of this law, to all cases of the same sort, that is, to all cases where the party may have an interest in the event of the suit. The same doctrine is confirmed by Voet in his Commentaries on the Pandects, lib. 5, tit. de Judiciis, sec. 35, 36, and by Peresius in his Prælectiones in Codicem, lib. 7, tit. 62, sec. 3. (b) The latter author says, "a third party may intervene whenever he becomes interested in a cause that is pending."

Vanderlinden's Judicial Practice, p. 177, has been referred to, for the purpose of shewing that an intervention could not be permitted in appeals; but that passage does not prove that in no case of an appeal can an intervention be allowed, but that interventions in appeals are not so frequently allowed as joinders are. The case referred to by that learned writer was most probably a case, in which the right of the person intervening was dependent on that of a litigant party, whose laches had already put him out of Court, and then it comes within the principle of the passages that have been already adverted to."

Although intervention is unknown in our Courts of Law and

(b) See also Voet, Com. ad Pand. lib. 42, tit. 1, sec. 29.

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Equity, it is admitted in the practice as well of our Ecclesiastical as our Admiralty Courts. (c)

The several Ecclesiastical Courts in general. (d)

With regard to the *Courts* exercising ecclesiastical jurisdiction, they are principally, 1. The Archdeacon's Court; 2. Each Bishop's Consistory Court; 3. Courts of Peculiars, as of a "dean and chapter," exclusive of the Bishop's Court; 4. The Arches Court, being a Court of appeal from the last two; 5. The Prerogative Court, principally relating to wills and letters of administration and suits respecting them. And from thence, as a Court of appeal now, is the *Court of the Judicial Committee* of the Privy Council, created and holden under the recent statutes. (e)

Neither of these Courts, although of considerable jurisdiction, is deemed a Court of Record, (f) their jurisdiction and powers are, however, supported and enforced by the aid of the Courts of law, and by some modern statutes. (g) It has been laid down as a general rule, that a sentence of the Spiritual Court in a matter within its jurisdiction, and on which there has been a direct issue, is conclusive until reversed in a civil action between the same parties. (h) But such sentence or act is not conclusive in a *criminal* proceeding; (i) and upon an indictment for forging a will, it may now be proved that the will was a forgery; notwithstanding the probate, until reversed, would be conclusive that the will was genuine for *civil* purposes. (k) And where a libel was exhibited in the Consistorial Court for disturbing the plaintiff in his right, interest, property and enjoyment of a pew, claimed as appurtenant to a messuage, upon which judgment was given that the pew belonged to the plaintiff, and such sentence was affirmed by the Court of Arches, who also admonished the defendant not to sit in the pew, it

(c) See Oughton's *Ordo Judiciorum*, tit. 14, and Clarke *Praxis Admiraltie*, tits. 38, 39. In *Dalrymple v. Dalrymple*, 2 Haggard's Cons. Rep. 137, a party was allowed to intervene after an appeal from the Consistory Court to the Court of Arches, and not having put in her allegation on the day assigned for that purpose, the judge rejected her prayer for further time, and concluded the cause. From this decision she appealed to the Delegates, who received her appeal and allowed her further time. See also on the doctrine of intervention, *Marquis of Donegal v. Chichester*, 3 Phil. 586; and *Chichester v. Donegal*, 1 Ad-dams, 5, 6; Madd. 375. And see 4 Hagg, 47, 61, note, as to hearing a counsel for intervener.

(d) Com. Dig. Courts, N.

(e) 2 & 3 W. 4, c. 92, and 3 & 4 W. 4, c. 41, see post.

(f) 3 Atk. 197; 5 Bla. C. 67, 69; *Phillip v. Crawley*, Freem. 84, pl. 103; 12 Vin. Ab. 128; 1 Stark. Ev. 243.

(g) 55 G. 3, c. 127; 2 & 3 W. 4, c. 93. (h) *Stedman v. Gooch*, 1 Esp. R. 6; *Dacosta v. Villa*, 2 Stra. 961; 1 Saund. 275, note (c); 1 Stark. Ev. 2 ed. 241, 243 to 245, fully.

(i) 11 State Tri. 262; 1 Saund. Rep. by Pattenon & Williams, 275, note (c); Phil. on Ev. 5 ed. 353; 2 Stark. Ev. 311.

(k) *R. v. Buttery and another*, Old Bailey, 6 May, 1802; 1 Stark. Ev. 245, note (p), overruling *R. v. Vincent*, 1 Stra. 481.

was held, that these sentences were not conclusive of the plaintiff's right, in an action by him for disturbance. (l) The distinction appears to be when the proceeding in the Spiritual Court has or not been *in rem*. (l) It is therefore obvious, that in general a suit at law for disturbance in the right to a pew is preferable to a suit in the Spiritual Court. (m)

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The *Archdeacon's Court* is the most inferior of the Ecclesiastical Courts. It may be held in the Archdeacon's absence, before his official appointed by him; and its jurisdiction is sometimes in concurrence with, and sometimes in exclusion of, the Consistory Court of the Bishop. From this Court, by 24 H. 8, c. 12, an appeal lies to the Consistory Court. (o)

1. Archdeacon's Court. (n)

The *Consistory or Diocesan Court* is the Court of every diocesan bishop, held in his cathedral, for the prosecution, hearing, and trial of *all ecclesiastical causes arising within his diocese*, (p) and also for granting probate and letters of administration, where there are assets only in that diocese, and not bona notabilia. (q) The bishop's chancellor, or his commissary, is the judge, and from his sentence an appeal lies, by virtue of the 24 H. 8, c. 12, to the archbishop of the province within which the diocese lies, viz. the Arches Court of the Archbishop of Canterbury. (r)

2. Consistory Court, or Diocesan of each Bishop.

The *Court of Peculiars*, as the very term imports, is an exempt jurisdiction over certain parishes dispersed through the province of Canterbury, in the midst of other dioceses, and which are exempt from the ordinary or bishop's jurisdiction, and subject to be appealed from only to the Metropolitan or Archbishop's Court. (t) *All ecclesiastical causes* arising within these peculiar or exempt jurisdictions are *originally* cognizable by this Court of Peculiars; and although Blackstone supposed that by 25 Hen. 8, c. 19, an appeal lies from this Court to the King in Chancery, (*i. e.* now to the Judicial Committee of the Privy Council,) yet as neither peculiars nor deans and chapters are mentioned in that act, it has been more recently held that an appeal from all peculiars and especially from the Court of the

3. The Court of Peculiars. (s)

(l) *Cross v. Salter*, 3 Term Rep. 639; Com. Dig. Courts, N. 9.

(m) See the pleadings at law 2 Chitty, Pleading, 817.

(n) Com. Dig. Court, N. 9.

(o) Construction of 24 H. 8. c. 12, as to appeals in *Parham v. Templer*, 3. Phil. Rep. 223 to 256.

(p) 3 Bla. C. 64; Law's Oughton, 2.

(q) *Ante*, vol. i. 522 to 529.

(r) *Supra*, note (p).

(s) 3 Bla. C. 65; Bac. Ab. Courts, Ecclesiastical Courts, A. 6.

(t) Per Sir John Nicholl in *Parham v. Templer*, 3 Phil. Rep. 245.

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Dean and Chapter of Exeter, lies directly to the Court of Arches, and certainly not to the Consistory Court of any Bishop. (u) Indeed in general, appeals and letters of request from peculiars lie at once to the metropolitan. (x) The Commissioners for inquiring into Courts of Justice in their report thus described the *Peculiars of the Court of Canterbury*:—"The Peculiar of his Grace the Archbishop of Canterbury comprise a number of *parishes*, most of which are situated in London and the neighbouring counties. They are divided into *districts*, the principal of which are the deanery of the Arches in London, the deanery of Shoreham in Kent, and the deanery of Croydon in Surrey. The judge is properly dean of the Arches, an appellation not unfrequently, though inaccurately, applied to the official principal of the Arches Court of Canterbury, and these two offices have been generally, though they are not necessarily, held by the same person." (y)

4: Arches
Court. (z)

The following account of the Court of Arches (originally called Curia de Arcubia or Bow Church, and now holden before Sir John Nicholl, (a)) is taken from the report of his Majesty's Commissioners for inquiring into the Courts of Justice, A. D. 1823. The Court of Arches is *chiefly* a Court of Appeal from the Courts of the several bishops or ordinaries within the province of Canterbury, and its *appellant jurisdiction* extends to *all causes or suits relative* to wills, intestacies, tithes, church-rates, marriages and *other matters cognizable in these Courts*. (b) But it has also an *original jurisdiction* in suits for *subtraction of legacy*, where the will has been proved in the Prerogative Court of Canterbury, (c) and where there is *not a trust* to be performed by the executor beyond that of merely paying the legacy; and it should seem that this is a preferable Court to resort to when the legacy is small. (c) It also entertains suits on *letters of request* from inferior jurisdictions within the province; (d) and it is usual to commence an original suit in this

(u) *Parham v. Templer*, 3 Phil. Ecc. Rep. 223; 11 Mod. 6; and see *Beare v. Jacob*, 2 Hagg. Ecc. Cas. 257.

(x) *Burgoyne v. Free*, 2 Addams's Rep. 406.

(y) See *Magnay v. St. Michael, &c.* 1 Hagg. Ecc. Cas. 48, note (u); Oughton's *Ordo Judicorum*, by Law, p. 7.

(z) *Norris v. Hemingway*, 1 Hagg. Ecc. R. 4; *Grignon v. Grignon*, 1 Hagg. 536; Oughton, tit. 15, ss. 1, 2, 9; and per Holt, C. J. 1 Lord Raym. 453; Consett on Courts, 5; and see further as to this Court, 3 Bla. C. 65; Com. Dig. Courts,

N. 3; 4 Inst. 337; *Beare v. Jacobs*, 2 Hagg. R. 258.

(a) *Burn's Ecc. L. tit. Arches*. He is also judge of the Peculiars of Canterbury and of the Prerogative Court.

(b) *Norris v. Hemingway*, 1 Hagg. Ecc. R. 4, note (u); *Dawe v. Williams*, 2 Add. R. 130; *Burgoyne v. Free*, 2 Add. 405.

(c) Oughton, tit. 15, ss. 1, 2, 9; and per Holt, C. J. 1 Lord Raym. 453; and see an instance of a suit for a legacy in *Norris v. Hemingway*, 1 Hagg. Ecc. R. 4.

(d) *Norris v. Hemingway*, 1 Hagg. Ecc. R. 4, note (a). See an instance of letters

Court by *letters of request*, instead of proceeding in the first instance in the Consistory Court.

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With respect to *Letters of Request* in general, they dispense with the necessity for instituting a suit in the first instance in the inferior jurisdiction, as in a Consistory Court, and authorize the suit to be at once instituted in or transferred to a superior Court, which could otherwise only exercise jurisdiction *as a Court of Appeal*. The judge of the inferior Court who signs the letter of request, by so doing waives or remits his own jurisdiction, and, generally speaking, at once the jurisdiction attaches in the appellate Court; and this without any consent or even communication with the intended defendant. (e) Letters of request ordinarily lie where an appeal would lie, and according to the *Canon law lie only to the next immediate Court of Appeal*, merely waiving the primary jurisdiction to the proper appellate Court, and this has given rise to the notion, generally speaking perfectly correct, that *letters of request go in the same course with appeals*; or, in other words, that the inferior ordinary must make request, or instance, of jurisdiction to that judge into whose Court the cause must have been appealed, had he himself proceeded in it in the first instance. (f) But it seems to be now settled that letters of request from the most inferior Ecclesiastical Court may be direct to the Arches Court, thereby omitting one or more other Courts of Appeal, and ousting them of their intermediate jurisdiction, which, as a Court of Appeal, they would otherwise have had. (g)

Jurisdiction of
Court of Arches
under Letters of
Request.

The present practice as to *letters of request* stands thus:—In cases where *any Diocesan Court*, within the province of Canterbury, has or claims a jurisdiction and right of adjudicating between parties residing therein, the *plaintiff* may (without the consent of the defendant or even apprising him) apply to the judge of the inferior or Diocesan Court for letters of request, in order that the cause may, in the first instance, be commenced in the *Arches Court of Canterbury*, and upon the *letters of request* being signed by the judge of the Diocesan Court, and accepted by the judge of the Arches, a decree issues under the seal of the latter Court calling upon the de-

of request from commissary of Surrey to Arches Court in a suit for perturbation of a seat, *Wyllie v. Mott*, 1 Hagg. 28, and see *Ex parte Williams*, 4 B. & C. 315; 1 Hagg. Ecc. C. 4, note (a). And see *form*, post, 498, note (h).

(e) *Burgoyne v. Free*, 2 Add. 406, where see observations on letters of request.

(f) *Ibid.*

(g) *Ibid.* 405 to 414.

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pendant to answer the charges therein preferred against him.
The *form* of such letters of request is subscribed. (*h*)

Jurisdiction of
Arches as a
Court of Ap-
peal.

As instances of *appeals* to the Court of Arches, we find suits for defamation removed from the Commissary Court of Surrey, and from the Consistory Court of Exeter into the Arches Court, and the sentence below afterwards reversed or affirmed with costs in both Courts. But it has been doubted whether the Court of Arches is empowered in any case to pronounce a sentence of deposition or deprivation. (*i*).

Mode of reco-
vering a *Legacy*
in Court of
Arches and
Diocesan
Courts.

Dr. Haggard, observing that the simple mode pursued in the Ecclesiastical Courts for enforcing payment of legacies is but little known, thus states the course of proceeding for a legacy in the Arches Court, in cases of all wills proved by the Prerogative Court, and by the official principals of each diocese, in cases of wills proved in the Diocesan Courts. He says, "the course of proceeding in the Arches Court is usually as follows. (*k*) The executor being *cited* to answer the legatee in a suit of subtraction of legacy, after appearance given, a short libel is brought in pleading that A. B. made a will, that he thereof appointed C. D., executor, and is since dead, leaving bona notabilia, and without revoking or altering his will; that since his death C. D. has proved such will in the Prerogative Court of Canterbury; that by his will A. B. left a legacy to E. F. in

Form of Letters
of Request for
instituting a di-
vorce suit in
Arches Court
instead of Dio-
cesan Court.

(*h*) Whereas A. B. of the parish of ———, in the county of Middlesex, in the diocese of London, Esquire, doth intend to commence and prosecute against his wife E. of the same parish of ———, and county of ———, and diocese of ———, a certain cause or suit of divorce or separation from bed, board and mutual cohabitation, by reason of adultery by her the said E. committed, and for that purpose hath requested me the Worshipful ———, Vicar-General of the Right Reverend Father in God, ———, by divine permission, Lord Bishop of ———, and official principal of his consistorial and episcopal Court of ———, to grant to him *letters of request* that he may apply for the original citation or decree in the said cause or suit in the Arches Court of Canterbury. And whereas the applying for the said original citation or decree in the Arches Court of Canterbury will, as it is represented to me, be of advantage to all the parties, not only from the able assistance they can have of counsel in the said Arches Court of Canterbury, but as the same will be also a more ready and expeditious way for the hearing and finally determining the said cause: These are, therefore, at the decree of the said ———, to request, and I do hereby request, the Right Honourable ———, Doctor of Laws, official principal of the said Arches Court of Canterbury, to decree a citation or decree to issue under seal of the said Arches Court of Canterbury, at the instance of the said ———, and thereby to cite her the said ———, to appear personally before him or his lawful surrogate, or other competent judge, in this behalf, and answer to the said ——— in his aforesaid cause or suit of divorce by reason of adultery, and to hear and finally determine the said cause according to law. In witness whereof I have hereunto set my hand and seal, this ——— day of ———, in the year of our Lord, ———.

L. S.

Signature of the Judge of the Inferior Court.

Signed, sealed and delivered in the presence of ———.

(*i*) *Cole v. Corder*, 2 Phil. Rep. 106; *Tocker v. Ayres*, 3 Phil. R. 539.

(*k*) *Cassel v. Roberts*, 3 Hagg. Ecc. R. 161, note (*a*).

the following terms, [the clause of the will containing the legacy is here recited,] that this legacy remains unsatisfied, and that C. D. is possessed of and has admitted assets; has been applied to and refuses payment; and further pleads the identity of E. F., and the legatee, and that he is of age; and the libel concludes with a prayer that the executor may be compelled to pay the legacy, and be condemned in costs. The records of the Prerogative Court prove all the facts, except the assets, age and identity of the legatee; and the executor is, upon the libel being admitted, assigned to give in his answer, which he must do on his oath: should he in his answer deny assets, or the legatee's identity or age, witnesses may be examined. Sometimes, as in the case in the text, there may be some special circumstances stated in the libel, and the executor also may plead responsively: but in a great majority of cases, the legacy is paid either as soon as the citation is taken out, or as soon as the libel is admitted. From the early stage in which these suits usually terminate, they pass in a degree sub silentio, and are thus generally supposed more than is really the case. *Of late they have, it is believed, become more frequent than they were a few years since.* Sometimes, as a preliminary proceeding, an inventory and account is called for in the Prerogative Court, and which it is advisable to apply for before the commencement of the proceeding, when it is at all apprehended that the executor will dispute his having received assets." (l) The bill for establishing Local Courts proposed that those Courts should be entrusted with a jurisdiction for the recovery of legacies, in which the course of proceeding would not have been very dissimilar from that above detailed; but Dr. Haggard observes, that "possibly if the *extremely simple, cheap and expeditious jurisdiction now exercised by the Ecclesiastical Courts in this class of cases were more generally known*—still more if it were extended to the recovery of legacies charged on the *realty*—the want of any further remedy would not be felt." (m)

The Court is now holden by its judge, in his quality of Official Principal, or by his Surrogate, in the Common Hall of the College of Advocates, within the parish of St. Benedict, near Paul's Wharf, London. (n) Formerly, from this Court, by 25 H. 8, c. 19, the appeal was to the Court of Delegates; but by

(l) See *ante*, vol. i. 518, 519, as to an executor's inventory or declaration in lieu thereof.

(m) Dr. Haggard's note, 3 Hagg. Ec. Cas. 161, note (d). The author, on a very recent examination into the practice

in suits of this nature, found it precisely to accord with the above extract from Dr. Haggard's Reports.

(n) Oughton, *Ordo Judicorum*, by Law, 7.

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the recent enactments that jurisdiction has been repealed, and the appeal must now be to the Court of the Judicial Committee of the Privy Council. (o)

5. Prerogative
Court. (p)

The Archbishop of Canterbury (and of York also) has his *Prerogative Court*, as well for *proving wills* and *granting letters of administration*, when the deceased, being a subject, has left *bona notabilia* in different dioceses, as for instituting, hearing and determining *all causes*, formal or summary, (i. e. on motions,) *relating to wills*, or administrations, or legacies, before a judge appointed by the archbishop, called the Judge of the Prerogative Court. But in the case of the *King* this Court has no jurisdiction over his supposed will. (q) Formerly an appeal from this Court was to the Delegates; (r) but under the recent act the appeal is to the Judicial Committee of the Privy Council. (s) This Court properly hears all *suits* and *proceedings* relative to the *grant* of probate, (t) or of letters of administration, and to the *assignment of administration bonds*. We have in the preceding volume, when examining the conduct to be pursued by executors and administrators, stated in part how and where probate and letters of administration are to be obtained, (u) and therefore only a few practical observations will here be added, with a statement of the practice respecting *Caveats*, to prevent the obtaining probate or letters of administration; and proceedings to compel *sureties* in an administration bond to *justify*.

Proceedings to
obtain prerogative
probate or
letters of admin-
istration. (a)

The mode of proceeding to obtain probate of a will, or letters of administration to the effects of a person deceased, is, for the executor appointed by the will, or party entitled to administration, to apply to a proctor of the Ecclesiastical Court. The party applying, if he be an executor, or entitled to the administration of an intestate's effects, is sworn before a surrogate of the judge to the *full value* of the deceased's personal estate, without deducting the debts due from him; (y) the original will

(o) Per Sir J. Nicholl, in *Parham v. Templer*, 3 Phil. R. 255.

(p) 3 Bla. Com. 65; Com. Dig. Courts, N. 2; Bac. Ab. Courts, Eccles. Courts, A. 3; Law's Oughton, 55.

(q) In the goods of his late majesty, King George the Third, on motion, 1 Addams's R. 255, a case of an alleged bequest of George the Third to Olive, Princess of Cumberland. This is an interesting document.

(r) 3 Bla. Com. 65, 66; 25 H. 8, c. 19.

(s) 2 & 3 W. 4, c. 92; 3 & 4 W. 4, c. 41.

(t) Law's Oughton, 57.

(u) *Ante*, vol. i. 521 to 529; and see further at the close of this work.

(x) The following practical directions and observations are from the pen of a most experienced proctor. See also further particulars and decisions, *ante*, vol. i. 525 to 529.

(y) *Ante*, vol. i. 525; and 55 G. 3, c. 184, s. 38; and see form of oath, *ante*, vol. i. 525, note (z); but *desperate* or *doubtful* debts need not be included before they have been actually received, *ante*, vol. i. 522.

is to be deposited in the public registry of the Ecclesiastical Court, and probate of a collated engrossed copy is granted. The probate and administration are documents on parchment, in which is stated the name and late residence of the deceased, and also the name of the executor or administrator, by what Court, and the day on which it is granted. The form of a *Prerogative Probate* is in the subscribed note. (x) The proceedings to obtain *letters of administration*, and the form of *affidavit*, and of the warrant for granting administration, will be found in the preceding volume. (a) The form of *Letters of Administration* granted by the Prerogative Court is given in the subscribed note. (b) The 22 & 23 Car. 2, c. 10, contains the form of the

(s) William, by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, do by these presents make known to all men that on the — day of —, in the year of our Lord one thousand eight hundred and thirty-four, at London, before the Worshipful —, Doctor of Laws, Surrogate of the Right Honourable —, Doctor of Laws, Master, Keeper or Commissary of our Prerogative Court of Canterbury, lawfully constituted, the last will and testament of A. B., late of Kensington, in the parish of Saint Mary Abbott, Kensington, in the county of Middlesex, and of Bruiyard, in the county of Suffolk, deceased, hereunto annexed, was proved, approved and registered, the said deceased having, whilst living, and at the time of his death, goods, chattels or credits in divers dioceses, or jurisdictions, by reason whereof the proving and registering the said will, and the granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and final discharging the account thereof, are well known to appertain only and wholly to us, and not to any inferior judge; and that administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning his will, was granted to E. B., widow, the relict of the said deceased, the sole executrix named in the said will, she having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels and credits, and to exhibit the same into the registry of our said Court on or before the last day of — next ensuing, and also to render a just and true account thereof. Given at the time and place above written, and in the — year of our translation. And see as to *Probates, ante*, vol. i. 526.

Form of Probate granted by Prerogative Court to a sole executrix.

Sworn under £ —, and that the testator died on the — day of —, A. D. 1834.

(a) As to Letters of Administration, *ante*, vol. i. 526, 527.
(b) William, by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan. To our well-beloved in Christ E. B., widow, the relict of A. B., late of —, in the parish of —, in the county of Middlesex, deceased, greeting: Whereas the said A. B., (as is alleged) lately died intestate, having, whilst living, and at the time of his death, goods, chattels or credits, in divers dioceses or jurisdictions, by reason whereof the sole ordering and granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and final discharging the account thereof, are well known to appertain only and wholly to us, and not to any inferior judge: we being desirous that the said goods, chattels and credits, may be well and faithfully administered, applied and disposed of according to law, do therefore by these presents grant full power and authority to you, in whose fidelity we confide, to administer and faithfully dispose of the said goods, chattels and credits, and to ask, demand, recover and receive whatever debts and credits, which, whilst living, and at the time of his death, did any way belong to his estate, and to pay whatever debts the said deceased at the time of his death did owe, so far as such goods, chattels and credits will thereto extend, and the law requires: You having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels and credits, and to exhibit the same into the registry of our Prerogative Court of Canterbury on or before the last day of — next ensuing, and also to render a just and true account thereof, on or before the last day of —, which shall be in the year of our Lord one thousand eight hundred and —; and we do by these presents ordain, depute and constitute you E. B., administratrix of all and singular the goods, chattels and credits of the said deceased. Given at London the — day of —, in the year of our Lord one thousand eight hundred and thirty-four, and in the — year of our translation.

Form of Letters of Administration granted by the Prerogative Court to the widow of intestate.

Sworn under £ —, and that the intestate died on the — day of —, A. D. 1834.

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administration bond, and the parts of which, as well as the remedies thereon, will be presently noticed.

Proceedings to enter a *caveat* so as to prevent grant of probate or of letters of administration. (b)

For the purpose of allowing any person interested in the deceased's effects an opportunity of contesting the validity of a will, or the right of a party to administration, such person can, upon application to a proctor, *procure a caveat to be entered in the public registry against a grant of probate or administration issuing unknown to the proctor who entered such caveat.* This *caveat* is entered on behalf of the interested party, in a *fictitious* name, (as "John Thomas.") By this preliminary measure the party objecting can be apprised of the name and the interest of the party to whom the probate or administration may afterwards be applied to be granted. Caveats are generally entered on the behalf of legatees in a will, or the next of kin, being the parties entitled in distribution of an intestate's effects, after payment of debts or of creditors of the deceased. The usual form of caveat is subscribed. (b) The further proceedings on such a caveat will be presently stated. (c)

Of obtaining an inventory or declaration in lieu.

In many cases parties beneficially interested in the due distribution of the assets, may call upon the parties to whom the probate or administration is to issue, and prior to its passing the seal, to give into Court a declaration in lieu of a detailed inventory of the deceased's effects. This declaration, without specifying the particular effects, gives a general account thereof and of their real or presumed value, according to the belief of the parties on their oath. (d)

Of the administration bond.

In all cases where *administration* issues, a *bond* is entered into, wherein the amount of the penalty should be double the value of the deceased person's effects. With two or three exceptions, the administrator is required to procure two persons as sureties, who sign a *bond* to the effect that the administrator will faithfully administer the effects according to law.

Of requiring the sureties in such bond to justify.

In some instances the *sureties are called upon to justify*, that is, to depose on oath that they are worth the amount of the penalty mentioned in the bond after payment of their just debts. But in general, (although certainly advisable so as to subject them to a prosecution for false swearing,) the sureties are not called upon to declare whether they are worth the amount of

Form of caveat.

(b) Let nothing be done in the goods of A. B., late of —, in the parish of —, in the county of —, deceased, unknown to E. F., proctor for John Thomas, (usually a fictitious name,) having interest." See the further proceedings on such caveat, *post*, 503.

(c) *Post*, 503.

(d) *Ante*, vol. i. 518, 519.

the penalty; and in no case can they be required to state the particulars of their property as ~~but~~ justifying in a superior Court at Westminster are compellable to do. (e) In which respect the practice of these Courts requires amendment, as it too frequently turns out that the sureties are wholly insufficient, and the creditors or next of kin are without redress. (f) The form of the affidavit of the *sureties* is subscribed in the note. (g)

A husband resident abroad may be directed, on the application of creditors, to give *justifying* security resident within the jurisdiction, on his taking a grant of administration to his wife. (h)

The preliminary proceeding generally adopted by parties having a right to contest the validity of a will, is to *cause a caveat to be entered* in the public registry of the Court of Probate, claiming jurisdiction over the assets of the deceased as we have just noticed. This course prevents the executors therein named, or party applying for probate, from obtaining it, without first establishing the validity of the will; and should the party, who entered the caveat, decide upon opposing the will, then the person applying for the grant has to *propound* the same and give in an *allegation*, the contents of which are generally confined to stating or pleading the making and executing the will, and the capacity of the deceased at the time of such execution. The party opposing the validity of the will is then to give in his *answer on oath* to the allegation, and witnesses are examined in proof of the will. A *response*, or rather an *allegation*, pleading the facts and circumstances and grounds of contesting the validity of the will, is then given in, and when admitted, the *answers* of the adverse party on oath are directed by the Court to be brought in by a time fixed. A *counter plea*, contradictory of the averments contained in the allegation of the party opposing the will, or explanatory of circumstances therein mentioned and pleaded, is given in by the party propounding.

Of proceedings on the caveat and contesting the validity of a will.

(e) 2 Phil. R. 280. (f) *See in Archbishop of Canterbury v. Tappin*, 8 B. & C. 150.

(g) In the goods of ———, deceased.

Appeared personally E. F., of ———, in the parish of ———, in the county of ———, and G. H., of ———, in the parish of ———, in the county of ———, the proposed sureties for Y. Z., the administrator of all and singular the goods, chattels and credits of A. B., late of ———, in the parish of ———, in the county of ———, deceased, and made oath that they are respectively worth the sum of ——— pounds after payment of their respective just debts.

On the ——— day of ———, A. D. 1834,

the said E. F. and G. H. were duly sworn }
to the truth of foregoing affidavit.

Before me,

——— Surrogate.

Form of affidavit of sureties justifying.

(h) *In the goods of Noel*, 4 Hagg. Rep. 207; ante, 502, 503.

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The *answer* of the opposing party is given on oath; witnesses are examined on the several allegations; then publication of their evidence takes place, and if it is not excepted to, the judge proceeds to hear and decide the cause.

A few points relating to suits and proceedings connected with probate and letters of administration, &c.

According to the practice of the Prerogative Court, the facts intended to be relied upon in support of any *contested suit*, are set forth in a plea, which is termed an allegation, and then is submitted to the inspection of the counsel of the adverse party; and if it appear to him objectionable either in form or substance, he *opposes the admission* of it. If the opposition go to the substance of the allegation, and it is well founded, then the Court rejects it, by which mode of proceeding the suit is terminated without going into any proof of the facts. (f)

The Court of Arches attached to it has jurisdiction over all legacies charged upon or payable out of personal property, and when there is not any *continuing trust*. (g) In the Prerogative Court all causes are *summary*. (h) By the practice of the Prerogative Court, the general rule as to costs is, that a party failing in a cause should pay the costs; but that rule is subject to the exception when the Court feel satisfied that proper grounds existed for making a claim. (i)

As regards *limited administration*, the Prerogative Court of Canterbury will, *on motion*, grant an administration limited to assign a term in the diocese of A., the will of the deceased (who had no goods out of the diocese of B., except this satisfied term,) having been proved in the Court of B., and the chain of executors being subsequently unbroken; and it seems that a diocesan probate can give no authority nor continue any privity as to a satisfied term in another diocese: (k) and on *petition* the Prerogative Court granted a limited administration to assign a satisfied term even in another diocese. (l)

Where a solicitor retained a will which he had prepared as a lien, and the Court of King's Bench had granted a prohibition to the Prerogative Court, staying any proceeding under the will until the lien had been satisfied, that Court nevertheless granted administration to the widow of the testator, limited to her sale of silks, which would deteriorate in value if they

(f) Note to *Thorold v. Thorold*, 1 Phil. Rep. 1.

(g) *Grignion v. Grignion*, 1 Hagg. R. 533.

(h) *Law's Oughton*, 59.

(i) Per Sir J. Nicholl in *Cor v. His Majesty's Proctor and Lannesley Prero-*

gative Court, 3d July, 1854.

(k) In goods of *Mary Powell*, 3 Hagg. R. 195; and see *Fowler v. Richards*, 3 Russ. 59.

(l) *Crosley v. Archdeacon of Sudbury*, 3 Hagg. R. 197.

should remain unsold, and to bring actions and dispose of the sale of stock. (m)

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In this Court summary applications are to be made for the delivery out of administration bonds executed in pursuance of the 22 & 23 Car. 2, c. 10, so as to enable the creditors or legatee or next of kin to proceed in an action at law in the name of the obligee (in the case of a prerogative administration, the Archbishop of Canterbury,) against the principal or sureties for a breach or breaches of the *condition*, the form of which is prescribed by the statute 22 & 23 Car. 2, c. 10, s. 2, (n) viz. for five distinct acts;—1st. For the administrator's making a perfect inventory of the deceased's effects; 2dly. His exhibiting the same into the registry of the Court at or before a named day; 3dly. Well and truly to administer, according to law, the effects that shall come to hand according to law, meaning duly to satisfy *creditors* in due order; 4thly. To

Application for assignment of administration bond, and action thereon.

(m) In the goods of Wood, deceased, before Sir J. Nicholl, Prerogative Court, 3d July, 1834. Dr. Lushington made an application to the Court in this case under the following circumstances:—The deceased, Mr. Wood, of Manchester, died in the present year, leaving a will, dated in 1831, in the possession of the solicitor who prepared it, Mr. Law, and who refused to deliver it up, contending that he had a lien upon it. A monition had issued against him and he had been pronounced in contempt. On the 5th of June a rule nisi had been granted in the Court of King's Bench, to shew cause why a writ in the nature of a prohibition should not issue to stay proceedings in this Court till the lien of Mr. Law was discharged, and which had been enlarged to the first day of next term. The only object of the rule was to protect the lien of Mr. Law; but the effect of staying proceedings altogether would be greatly to deteriorate the value of the property. The deceased had been a manufacturer and printer of cottons and other goods for home consumption, of which he left a considerable stock, which was adapted to the fancy of purchasers, and unless sold in the season, the articles would be deteriorated one half. Debts were also to be sued for and received. He submitted that the Court could grant a limited administration to dispose of the stock, to recover and pay debts, discharge the men, and give up warehouses.

Dr. Lushington said he remembered a case in which a similar application had been granted. A gentleman arrived from the West Indies with a large cargo of cotton, and he died almost immediately on his arrival. Evidence was found among his

papers that a will had been made; and the Court, on being applied to, granted a limited administration to sell the goods. A power to the same extent was sought in the present case, and also that the widow might be enabled to collect in the accounts and apply them to the discharge of certain debts.

Sir J. Nicholl said, the power to pay debts could not certainly be granted; as, if it were, an undue preference might by possibility be given to some creditors; and it was the duty of the Court to take care that nothing was done to prejudice the party having the lien.

Dr. Lushington hoped that the widow would, at all events, be permitted to discharge the warehousemen, and also to give up the warehouse, as very great expense was at present unnecessarily incurred.

Sir J. Nichol, after some further discussion, ordered that a limited administration should be granted to the widow, to enable her to collect the debts, and to bring actions for debts, and also to dispose of the stock in trade.

In another note of this case it was stated, that after argument by Mr. Follett for Mr. Law, and Mr. Wightman for Mrs. Wood, a prohibition was actually issued to the Prerogative Court, staying any proceedings under the will until the lien had been satisfied, *sed quere*. As to whether a lien on an original will could exist, see *Georges v. Georges*, 18 Ves. 294; ante, vol. i. 513, note (n).

(n) See the last construction of that statute and the condition of the bond in *Archbishop of Canterbury v. Robertson*, 3 Tyrw. Rep. Exch. 390 to 419.

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make a true and just account of such his administration before a named day; 5thly. To deliver and pay the residue, i.e. after satisfying creditors, as shall be decreed by the judge of the Court. It follows that the obligors may be sued if the administrator be guilty of a breach of either of these stipulations; as if he do not duly administer the assets by paying creditors, and especially if he misapply or appropriate them to his own use; or finally, if he be decreed to pay the residue to a named person or persons and neglect to do so. (o) And if an administrator has been guilty of a devastavit he may be sued in the name of the archbishop by a creditor or legatee, or next of kin, although there has not been any decree as to the residue. (p) And though it is stated that the Prerogative Court never requires an administrator to deliver an inventory or account before citation, and that the same is very seldom delivered until called for, (q) yet it has been held that a legatee or next of kin may assign a breach in not delivering a perfect inventory, and this even without citation; (r) but then on such a breach the damages would probably be merely nominal. (s)

We have seen that the right to call for a final inventory may be prejudiced, if not annulled, by delay in calling for it; (t) and in a recent case it was held, that an application to the Prerogative Court to have the administration bond delivered out so as to sue at law thereon, after great delay, was too late; (u)

(o) *The Archbishop of Canterbury v. Robertson*, 3 Tyrw. Rep. 300, and cases there collected.

(p) *Id. ibid.*; *Canterbury v. Howes*, Cowp. R. 140; *Folkes v. Dominique*, 2 Stra. 1137; *Chitty's Col. Stat.* 324.

(q) *Archbishop of Canterbury v. Robertson*, 3 Tyrw. 395; ante, vol. i. 517.

(r) *Greenside v. Benson*, 3 Atk. 252; and see *Archbishop of Canterbury v. Waldron*, in K. B. G. H. 8 Feb. 1820, MS.; *Chit. Col. Stat.* 324, in notes.

(s) See observations in *Archbishop of Canterbury v. Robertson*, 3 Tyrw. Rep. 410; but see per Chambre, J., *Plomer v. Ross*, 5 Taunt. 391.

(t) Ante, vol. i. 517, note (g); *Ritchie v. Rees*, 1 Add. 144; *Pitt v. Woodham*, 1 Hagg. R. 247.

(u) *Robson v. Leek and another*, Prerogative Court, 10 July, 1834. Sir John Nicholl gave sentence in this case, which was an application to have the administration bond delivered out, in order to its being sued upon in a court of law. The learned judge, after commenting upon the reported cases, especially that of "*The Archbishop of Canterbury against Howes*," Cowp. 140, was of opinion that this Court had a discretion to judge of the expediency of allowing the bond in such cases

to be attended with; and, considering the great lapse of time which had taken place in this case, during which no steps had been taken against the proper parties, and the irregularities in the proceedings, he should decline complying with the application, and dismiss the parties proceeded against. He was the less reluctant to come to this decision, because, besides a Court of Appeal, the party making the application might have recourse to a Court of Law or a Court of Equity.

In *Hunt against Burton and Fauntleroy*, which was a similar application, Sir John Nicholl distinguished that case from the last. Here the breach of the bond was apparent, for of four conditions three had been violated. The delay of fourteen years was in some measure accounted for, and steps had been taken in Chancery. It was quite clear that there had been a breach of the bond; there was, therefore, *prima facie* ground for complying with the application; and there being no sufficient reason shewn to the contrary, the Court, he thought, was bound to allow the party to resort to a Court of Law for such redress as could be obtained by a suit upon the bond. He should therefore overrule the protest, and direct the bond to be delivered out

but in another case, where the delay was accounted for, and there had been proceedings in Chancery, the application succeeded. (x) Generally speaking, if it be made appear that an administration bond has been forfeited, it is the duty of the Court to enable a creditor, or legatee or next of kin to sue thereon in the name of the obligee, leaving the ultimate liability of the sureties to be tried in such suit. (y) If the assignment of the bond should be refused, the parties must have recourse to a Court of Law or Equity, and we have seen that when the estate is considerable the safest course is to file a bill in equity in the first instance, so as to secure the fund. (z) And as a Spiritual Court cannot try whether an administrator has paid a creditor his debt or not, or award payment thereof by him, but must take the account as it is sworn without further investigation in that Court; (a) it follows that when the correctness of the administrator's account is disputed, the proceedings in a Court of Equity, where they can be examined into, are preferable.

The archbishop has what is termed a *Court of Faculties*, which as it does not hold plea in any suits, ought not, perhaps, strictly to be here mentioned; but yet it may be proper to notice it, because it is in this Court that the rights to pews and monuments and other rights of burial, so interesting to individuals and their relatives, are created. It has also various other powers under 25 Hen. 8, c. 21, in granting licenses, dispensations, faculties, &c. (c) Thus in the Peculiar Court of Canterbury, a license and faculty may be obtained by executors for setting apart, appropriating and conferring a vault made in a church, "for the use of a particular family, as long as they continue parishioners and inhabitants;" provided it appear to the Court that no injury will result to the rest of the parishioners; (d) and the obtaining such a faculty seems to be the only secure mode of appropriating a pew de novo. (e) If a faculty for annexing a pew to a messuage has been obtained by surprise and undue contrivance, it may be revoked on appeal to the Court of Arches. (f)

6. The Court of Faculties. (b)

(x) *Hunt v. Burton and another*, same day, see last note.

(y) *Devey v. Tupper*, 3 Add. R. 68.

(z) *Ante*, vol. i. 716 a, note (i), and 552; *Sharpley v. Sharpley*, M'Clel. Rep. 506.

(a) *Toller*, 495; 3 Tyrw. R. 409, n. (b).

(b) See in general, *Com. Dig. Courts*, N. 5.

(c) *Com. Dig. Courts*, N. 5.

(d) *Magnay v. Rector*, 1 Hagg. 48; and

see *Wyllie v. Mott*, *id.* 34; *Butt v. Jones*, 2 Hagg. 423; *Rich v. Bushnell*, 4 Hagg. 164; *Fuller v. Lane*, 2 Add. Rep. 419; 1 Phil. Rep. 232, 237; *Woolcombe v. Ouldrige*, 3 Add. R. 1.

(e) *Ante*, vol. i. 50 to 52; *Wyllie v. Mott*, 1 Hagg. 39; *Blake v. Osborne*, 3 Hagg. 726.

(f) Per Sir John Nicholl in *Butt v. Jones*, 2 Hagg. 419.

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So the obtaining a faculty is the only legal mode of erecting an organ in a parish church, (g) or to level a church-yard, &c. (h) The same law applies to monuments and vaults. (i)

SECT. XI.—Of the Court of Admiralty.

The Divisions, and its Jurisdiction in general.

I. When the Court has Jurisdiction.

1. Jurisdiction in Cases of Torts.

1. In a Suit for a Sea Battery.

2. In a Suit for Collision of Ships.

3. In a Suit for Possession of a Ship.

4. In a Suit for Restitution of Goods piratically or illegally taken, but not as Prize.

2. Jurisdiction in cases of Contracts express or implied.

1. Suits between Part-Owners of a Ship

2. Suits for Mariners' Wages.

3. Suits for Pilotage.

4. Suits on Bottomry Bonds.

5. Suits and proceedings for Salvage.

6. Wrack.

II. When the Court has not Jurisdiction.

III. Course of Proceedings in this Court.

SECT. XI.
Of the Court of
Admiralty. (k)

The *Court of Admiralty* (also termed the *Instance Court*) is a mere municipal tribunal, (l) perfectly distinct from the *Prize Court*, which is principally an international Court, existing only during war or until the litigations incident to war have been brought to a conclusion, (l) although frequently confounded in consequence, perhaps, of the same judge usually presiding in both Courts; indeed it will be observed, upon examination of the commission under which the *Court of Admiralty* proceeds, that the term *prize* is not once therein used. (m) It is a Court principally for the determination of *private* injuries to *private* rights arising *at sea* or *intimately connected with maritime subjects*, the principal of which are enumerated in a recent act, 2 W. 4, c. 51, s. 6, which removes all doubts as to the jurisdiction of the *Vice-Admiralty Courts abroad*, and enables them to hear and determine suits for *seamen's wages*, *pilotage*, *bottomry*, *damage to a ship by collision*, *contempt in breach of the regulations and instructions relating to his Majesty's service at sea*, (n) *salvage*, and *droits of Admiralty*, when a ship or its master shall come within the local limits of the *Vice-Admiralty Court abroad*, and notwithstanding the cause of such action

(g) *Pease v. Rector of Clapham*, 3 Hagg. 12.

(h) *Sharpe v. Sangster*, 3 Hagg. 333.

(i) *Seager v. Bowle*, 1 Add. 341. 351.

(k) See in general Clarke's *Praxis*, 3 Bla. Com. 68, 69, 106, Bac. Ab. Court of Admiralty, Com. Dig. Court of Admiralty.

The jurisdiction, practice and fees of the *Vice-Admiralty Courts abroad* are settled by 2 Wm. 4, c. 51. If a *Vice-Admiralty Court* had no jurisdiction, then

the Court of Admiralty has no jurisdiction on appeal. See the *Hercules*, 2 Dodson's Ad. Rep. 336.

(l) Per Sir Wm. Scott, 1 Dodson's Ad. Rep. 99, 100.

(m) Per Cur. in *Le Caux v. Eden*, Dougl. 372, 612.

(n) A *Vice-Admiralty Court abroad* has no jurisdiction in a cause of breach of revenue, unless under some express statutory institution. Per Sir Wm. Scott, *The Hercules*, 2 Dodson's Ad. R. 336.

arose elsewhere." (o) The Vice-Admiralty Courts abroad, and this Court as a Court of Appeal therefrom, have not, it should seem, any *original* jurisdiction in *revenue cases*, unless under express statute, and by 49 G. 3, questions of that nature must be tried where the offence was committed or the seizure made. (p) It has been observed by the highest authority, on the question of the jurisdiction of this Court, that a great part of the powers given by the terms of the commission or patent of the judge of the High Court of Admiralty, are totally inoperative, and that its active jurisdiction stands in need of the support of *continued exercise and usage*. (q) Indeed the commission has been narrowed rather than extended in jurisdiction by construction. (r)

The ancient statutes, 13 Rich. 2, c. 5, 15 Rich. 2, c. 3, and 2 H. 4, c. 11, (s) as well from the recitals as their enactments,

(o) 2 W. 4, c. 51, s. 6 &c.

(q) Per Lord Stowell, in *1 Jollo*, 1 Hag. L.

(p) *The Hercules*, 2 Dodson's Ad. R. Ad. R. 51.

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(r) *Id.* 509.

(s) The first prohibits the Court of Admiralty from intermeddling with any matter done within the realm but only 'of a thing done upon the sea'. The second is to the same effect, and the third act enforces the regulation by giving action on the case to the party aggrieved by wrongful assumption of jurisdiction to recover double damages, and ten pounds to the king if attainted.

13 Rich. 2, c. 5. What things the Admiralty and his deputy shall meddle - Item. Forasmuch as a great and common clamour and complaint hath been oftentimes made before this time, and yet is for that the Admirals and their deputies hold their sessions within divers places of this realm as well within franchises as without, encroaching to them greater authority than belongeth to their office, in prejudice of our lord the king and the common law of the realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people it is accorded and assented that the admirals and their deputies shall not meddle from henceforth of any thing done within the realm but only of a thing done upon the sea as it hath been used in the time of the noble Prince King Edward, grandfather of our lord the king that now is.

15 Rich. 2, c. 3. In what places the admiral's jurisdiction doth lie - Item. At the great and grievous complaint of all the commons made to our lord the king in this present parliament for that the admirals and their deputies do encroach to them divers jurisdictions, franchises, and many other profits pertaining to our lord the king, and to other lords, cities and boroughs other than they were wont or ought to have of right, to the great oppression and impoverishment of all the commons of the land, and hinderance and loss of the king's profits and of many other lords, cities and boroughs through the realm, it is declared, ordained and established, that of all manner of contracts, pleas and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admirals Court shall have no manner of cognizance, power nor jurisdiction but all such matters of contracts, pleas and quarrels and all other things rising within the bodies of counties as well by land as by water as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied by the laws of the land, and not before nor by the Admiral nor his lieutenant in any wise nevertheless of the death of a man and of a mayhem done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognizance, and also to arrest ships in the great flotes for the great voyages of the king and of the realm, saving always to the king all manner of forfeitures and profits thereof coming, and he shall have also jurisdiction upon the said flotes during the said voyages only, saving always to the lords, cities and boroughs their liberties and franchises.

2 Hen. 4, c. 11. A remedy for him who is wrongfully pursued in the Court of Admiralty.—Item. Whereas in the statute made at Westminster the thirteenth year of the said King Richard, amongst other things it is contained, that the admirals and

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shew how much jealousy was anciently entertained of the jurisdiction of this Court, and the late Lord Tenterden, in his admired work on Shipping, adverts to the *flame of jealousy* formerly prevailing in Westminster Hall against all the Courts at Doctors' Commons, including as well the Spiritual as the Admiralty Courts. (t) Those jealousies however have long since subsided, and the same observations that have, we may remember, been made respecting the Ecclesiastical Courts, equally apply to the modern judges of the High Court of Admiralty. (u) The successive judges of that Court, indeed, so far from evincing any desire improperly to assume jurisdiction which it has not, state it as an invariable maxim, that the Court is *ex mero motu* bound to reject what does not belong to its jurisdiction, (x) though in cases free from doubt it is also bound to exercise and not abdicate that jurisdiction with which it has been invested, and ought usefully and beneficially to employ on behalf of its suitors. (y)

The jurisdiction of the Court of Admiralty in general.

This Court has jurisdiction to try and determine most *maritime causes* or suits for *private* injuries, which, although had the same transaction entirely occurred on shore, would in their nature have been of common law cognizance; yet having been either committed on the high seas, or connected with maritime transactions, are therefore considered better to be examined and remedied in this peculiar Court, which, from its very constitution and practice, is better informed upon nautical subjects than any common law Court, especially as it has power to convene and have the assistance of two or more naval and other personages to assist its judgment. The statutes 13 Rich. 2, c. 5, 15 Rich. 2, c. 3, and 2 Hen. 4, c. 11, however direct, that the admiral and his deputy shall not meddle with any thing *but only things done upon the seas*, and quarrels (*querrelles*

their deputies shall not intermeddle from thenceforth of any thing done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward, grandfather to the said King Richard, our said lord the king, will and granteth, that the said statute be firmly holden and kept and put in due execution; and moreover the same our lord the king by the advice and assent of the lords spiritual and temporal, and at the prayer of the said commons, hath ordained and established, that as touching a pain to be set upon the admiral or his lieutenant that the statute and the common law be holden against them, and that he that feelth himself grieved against the form of the said statute, shall have his action by writ grounded upon the case against him that doth so pursue in the Admiral's Court, and recover his double damages against the pursuant, and the same pursuant shall incur the pain of ten pounds to the king for the pursuit so made if he be attainted.

(t) Abbott, 4th ed. 72, n. (p); and see ante, 307.

(u) Ante, this volume, 307; and see Apollo, 1 Hagg. R. 315.

(x) Per Sir William Scott in *The Hercules*, 2 Dodson's Ad. R. 367, 377.

(y) Per Sir William Scott in *Hercules*, 2 Dod. Ad. R. 377.

or disputes) there arising, and therefore the Admiralty Court has properly no cognizance of any contract, or anything done within *the body* of any county either by land or by water (meaning rivers), nor strictly of any wreck of the sea, for that must be cast *on land* before it becomes a wreck; (s) and damages are recoverable for a wrongful suit in the Admiralty when it was not properly cognizable there. (a)

But as to *flotsam, jetsam* and *ligan*, the Admiral hath jurisdiction when they are in and upon the sea. (b) If part of any contract or other cause of action have arisen upon the sea, and part upon the land, then the common law excludes the Admiralty Court from its jurisdiction, for part belonging to one cognizance and part to another, the common or general law takes place of the particular, (c) and, therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as *seamen's wages*, are proper objects of the Admiralty jurisdiction, even though the *ordinary* contract for them be made upon land, (d) yet in general, if there be *a contract made on shore or in a river in England*, and to be executed upon the seas, as a charter-party or covenant that a ship shall sail to Jamaica; or if a contract be made upon the sea to be performed *in England*, as a bond on ship board to pay money in London, these kind of mixed contracts belong not to Admiralty jurisdiction, but only to the Court of common law; (e) and it has been holden that the Admiralty Court cannot hold plea of any contract under *seal*. (f) But to these rules there are exceptions, and, therefore, we will consider more particularly the subjects of jurisdiction, which may be arranged under *three general divisions*, as 1. In cases of *tort*; 2. In cases of *contract*; and 3. The *general practice* or course of proceedings in the Admiralty Court, which may be considered as constituting part of its jurisdiction, and rendering it very frequently expedient to resort to this Court in preference to any other.

When observing upon the Ecclesiastical Court, we noticed

(s) 3 Bla. Com. 106. But see as to wreck *The Augusta*, 1 Hagg. Ad. R. 16; ante, vol. i. 100.

(a) 2 Hen. 4. c. 11.

(b) 5 Coke's R. 106.

(c) Co. Lit. 261.

(d) 1 Vent. 146; see further, post, 520.

Seaman's Wages.

(e) Hob. 12; Hale's Hist. C. L. 35. In *Ousten v. Hebdon*, 1 Wils. 101, Lee, C. J. said, "generally speaking the Court of Admiralty has no jurisdiction of matters of contract done or made at land."

(f) Hob. 212.

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the ancient jealousies of the courts of law against all the Courts at Doctors' Commons, including the Admiralty Court, but which have happily long subsided. (g) And so far from the judges of the Court of Admiralty now attempting to extend their jurisdiction, we find a contrary disposition prevails; (h) and especially the Court reluctantly interferes when the *right* or *title* (as to a ship) is the direct *question* to be determined; (i) and the Court is also reluctant to interfere when a more comprehensive suit connected with the cause is pending in the Court of Chancery, (k) though it will decide upon a mate's claim to wages against a person who has assumed to act as owner or employed him, although there be a more extensive suit in Chancery depending between contending owners to the actual property in the ship. (k)

Appeal now to the Judicial Committee of the Privy Council.

Formerly from the sentence of the Admiralty judge the appeal was to the Delegates, and then by special leave to a commission of review; but now, as those Courts of Appeal are abolished, the appeal is to the Judicial Committee of the Privy Council under the recent statute, (l) the provisions of which will be presently fully considered.

1. Jurisdiction of the Court of Admiralty in cases of *torts*.

1. The jurisdiction of the Court of Admiralty in cases of *torts* is confined to *torts* committed *at sea*, or at least committed on the water and within the jurisdiction of the Court of Admiralty, and are principally suits for, 1. *Sea batteries*; 2. For *collision of ships*; 3. For *restitution of possession of a ship* where there is no *bonâ fide* claim for withholding it; and 4. Suits for *piratical and illegal takings at sea*.

1. Suit for a sea battery.

A suit may be instituted in the Admiralty not only by a *sailor* or other officer or person employed on board a ship during a voyage, against the captain or master, or other person on board the same ship, or against a person on board another ship, for an assault and battery, but even by a *passenger* against the master, when the injury was committed during a voyage or on the high seas. (m) In Courts of law, upon a special affidavit of a serious battery, and that the party who committed

(g) *Ante*, 307; and Abbott's Laws of Shipping, 4th ed. 72, n. (p).

(h) See cases in notes *infra*; and per Sir William Scott, 4 Rob. 75, 76.

(i) Per Lord Stowell in Pitt, 1 Hagg. A.L. R. 243, 244.

(k) Per Lord Stowell in *St. John*, 1 Hagg. Ad. R. 337.

(l) 3 & 4 W. 4, c. 41, *post*. "The Judicial Committee of the Privy Council."

(m) *The Ruckers*, 4 Rob. 73.

it is about to leave the kingdom, a judge will sometimes make an order to hold the party to bail, and he will be arrested and obliged to find bail, and the action will be tried by a jury, and that in the usual course. But if an order to hold to bail should be refused, then it may be preferable when the party guilty of the battery is the owner or master of the vessel on board which the battery was committed, to proceed in the Court of Admiralty, when it is of course to issue a warrant to *arrest* the master, and he may be compelled to find *bail*, (as for instance to the amount of £300 or other sum,) and thereupon the plaintiff is to *libel* the defendant in that Court, and the judge, after examining the evidence, may himself award damages, or he may, if he think fit, convene a jury to *assist* him, (o) and the successful party is entitled to costs. (p) In a case of this nature the libel should not impute to the master or owner *any criminal* charge, as an imputation of subornation of perjury, and if it do, it must be erased. (q) In a similar suit by a mariner against the master, Lord Stowell adjudged £120 and expenses of the suit; and that case establishes that a suit in this Court, when the witnesses are staying in this country only a short time, is preferable to an action in a Court of Law, and this, notwithstanding the assistance of the recent enactment enforcing the examination of witnesses on interrogatories when they are about to leave the kingdom. (r) In such a suit an exceptive allegation may be admitted, viz. that a witness who had sworn to the battery had since deposed before a magistrate in a manner confessing his previous perjury, and that he has since gone abroad. (s)

A suit may also be instituted with advantage in this Court for *damage* occasioned by *one ship running foul of another*, (t) although it is more usual to proceed by action in the temporal Courts. There are some peculiarities and advantages attending a suit in *this Court*, which may render it sometimes preferable to proceed here, though when it is expected that there will be much contrariety in the evidence and some difficulty in eliciting the truth, the advantage arising from the examination of witnesses *viva voce* before a jury may render it advisable to proceed by action. The owner of a damaged vessel may in-

2. Suits for collision of ships.

(o) *The Ruckers*, A.D. 1801, 4 Rob. A.D. 1825.

73, 74, n. (a).

(p) *Ibid.* 76, n.

(q) *Ibid.* 76.

(r) *Enchantress*, 1 Hagg. Ad. R. 395,

(s) *Centurion*, 1 Hagg. Ad. R. 162.

(t) See full observations of Lord Stowell in *Dundee*, 1 Hagg. Ad. R. 109, 121.

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stitute a suit in the Instance Court against the owners of the vessel that occasioned the damage, to recover compensation and costs; and if the question to be examined should depend much upon technical skill and experience in navigation, the parties may, with the permission of the judge, apply for and obtain the assistance of two or more *Trinity Masters*, who will, at the request of the Court, after hearing all the evidence on each side in open Court, at the desire of the judge, state the impression which the evidence has made upon them as to which of the ships or parties was to blame and in what respects; whereupon the judge, so assisted, will form his own independent judgment and decide accordingly. (u) In the case of the *Woodrop, Sims*, (x) Sir Wm. Scott thus distinctly stated the legal classification of collisions of this nature. "There are four possibilities under which an accident of this sort may occur. In the *first* place it may happen without blame being imputable to either party; as where the loss is occasioned by any other *vis major*, in that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in *any* degree. *Secondly*, a misfortune of this kind may arise where *both parties are to blame*, where there has been a want of due diligence or of skill *on both sides*, in such a case the rule of law is that the loss must be *apportioned between them*, as having been occasioned by the fault of both of them. *Thirdly*, it may happen by the misconduct of the *suffering party only*; and then the rule is that the *sufferer* must bear his own burthen. *Lastly*, it may have been the fault of the ship which ran the other down, and in this case the *injured party* would be entitled to an entire compensation from the other." It is further a general rule that "the law imposes upon the vessel having *the wind free*, the obligation of taking proper measures *to get out of the way* of a vessel that is *close hauled*, and of shewing that it has *done so*, and if not, the owners of it are responsible for the loss which ensues. (x) It frequently happens in cases of this kind that there is great discordance of evidence as to the facts upon which the Court has to form its decision. The testimony of the witnesses is apt to be discoloured by their feelings and by the interest which they take in the success of the cause, and the Court too frequently has to decide upon great diversities of statement as to the courses the vessels were steering, or the quarter from which

(u) *The Thames*, 5 Rob. 345 to 349.

(x) *The Woodrop, Sims*, 2 Dodg. Adm. R. 65.

the wind was blowing, at the time when the accident occurred. In these cases the course of proceeding in Court is for the witnesses on each side to give their testimony, which is considered by two, at least, Trinity Masters, who assist the Court and state their opinion upon the testimony which vessel was to blame, and then the admiralty judge gives judgment. In a cause of collision against a *steam vessel*, the Court, assisted by Trinity Masters, pronounced for damages and costs, holding that a steam vessel, not receiving her impetus from sails, but from steam, is or ought to be more under command, and manifestly having seen the other vessel, was to blame. (z) It should seem that usually *steam boats* should generally go to the *starboard*; (z) whilst the general rule of navigation is, that when other ships are crossing each other in opposite directions, and there is the least doubt of their going clear, the ship on the *starboard tack* is to persevere in her course, while that on the *larboard* is to bear up or keep more away from the wind.

When it is doubtful which vessel was to blame, or whether such a degree of blame may not be imputable to each as to render it difficult to decide who, if either, ought to make compensation, then it seems to be preferable to proceed in the Court of Admiralty, because if it should then appear that the navigators of both the ships were equally to blame, but that only one was materially damaged, this Court has a peculiar and singular jurisdiction, to decree that the owners of each vessel shall make good a moiety of the entire damage, (a) although in a Court of *law*, when the mischief done was the result of the combined neglect of both parties, both are in *statu quo*, and neither could recover any compensation from the other. (b)

When the ship that has occasioned the damage is *foreign*, or the owner or person to be sued resides abroad or is insolvent, so that a verdict at law for damages might not be enforced, it is certainly preferable to proceed in this Court, because here, by the usual course of proceeding, the suit is initiated by *arrest of the ship, tackle*, apparel and furniture; and the security of such property will not be removed excepting upon the terms of adequate *bail* to answer for the liability of the stores as well as of the ship; (c) and the statute 1 & 2 G. 4 c. 75, allowing a *summary proceeding* and *arrest* of a ship in case of collision, extends as well to foreign as to British ships, and so does the

(z)* *Shannon*, 2 Hagg. Adm. R. 173. *

Exchequer, 85.

(a) *Ante*, 514; *Hay v. Le Neve*, 2 Show. 401 to 405.(c) Per Lord Stowell, in *Dunder*, 1 Hagg. Adm. R. 124, 125.(b) *Vernal v. Gardner*, 3 Tyr. Rep.

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Pilot Act, 6 G. 4, c. 125, s. 55, protect the owner and master of a foreign ship from liability, when he has duly conformed to that act by taking a regular pilot on board. (d) But if a collision take place in a river, or within *the body* of any county, then no suit in the Admiralty Court would be sustainable, but that Court on protest would decline to interfere, or a prohibition from the King's Bench might be issued. (e) In suits for collision the crew of the ship charged with the damage are admitted as *witnesses* from necessity. (f)

3. In a suit for possession of a ship.

3dly. To a limited extent the Instance Court has jurisdiction, upon a suit instituted therein, to put a claimant, having a clear and indisputable title; into *possession of a ship*, independently of cases between *part-owners*, presently noticed. (g) Sir Wm. Scott, in a modern case, stated the history and limits of this jurisdiction. He observed, "it is certainly true that this Court did formerly entertain *questions of title* to a much greater extent than it has lately been in the habit of doing. In former times, indeed, it decided without reserve upon all questions of disputed title which the parties thought proper to bring before it for adjudication. After the Restoration, however, it was informed by other Courts, that such matters were not properly cognizable here, and since that time it has been very abstemious in the interposition of its authority. However, the jurisdiction over causes of *possession* was still retained, and although the higher tribunals of the country denied the right of this Court to interfere on mere questions of disputed *title*, no intimation was ever given by them that the Court must abandon its jurisdiction over *causes of possession*. If a question of *title* occur incidentally in a cause of possession, it then becomes necessary for the Court to inquire into the title, at least so far as to satisfy itself that it may safely decree possession to the party seeking it. The mere averment by one of the parties that there is a conflicting claim of title, which may be perhaps a mere *cobweb title*, does not arrest the progress of the cause, but the Court may so far inquire into the pretended title, as to ascertain whether it be bona fide founded on probabilities or merely colourable, and if the latter, the Court may decree possession to the other party." (h)

(d) *Christiana*, 2 Hagg. Adm. R. 183.

(e) *Public Opinion*, 2 Hagg. Adm. R. 398.

(f) *Catherine of Dover*, 2 Hagg. Adm. R. 145.

(g) *The Warrior*, 2 Dodg. Adm. R. 288;

post, 517, 518.

(h) *Id.* 288, 289. This doctrine, that a mere colourable assertion is not to preclude a justice of the peace or the Court from proceeding, is adopted at law as in the instance of church rates, *ante*, 473.

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By the very learned judgment of Sir W. Scott, it appears that the Court of Admiralty has authority to entertain a *civil* suit or intervening claim for the *restitution* of goods, (technically called for the *point of restitution*), taken *piratically* on the high seas or *otherwise* than under colour of capture. (i) He observed, "now that this Court had *originally* cognizance of all *wrongs*, in short, of all transactions civil and criminal upon the high seas in which its own subjects were concerned, is no subject of controversy, for all history of English law supports it. In the reign of King Henry VIII. (28 H. 8, c. 15,) its *criminal* jurisdiction was in a great part removed by statute to a *mixt* commission, where it still continues to reside, and under which separately *criminal offences* at sea are still tried and decided. But that was the *only part* so removed, and the civil cognizance over *piracy*, which was not a *felony* at common law but only a *mis-demeanour* not merging the civil remedy, remained cognizable in and remediable by this Court, especially in favour of the suits of foreigners. And if goods are taken *piratically* at sea, though sold afterwards at land, the Court of Admiralty here has cognizance thereof and may award restitution to the original owner, as well against the original spoliator as against the purchaser," (k) and even without a previous conviction of the piracy, the original owner may proceed in a suit for restitution. (l) In case, therefore, of an illegal taking of a ship or goods at sea or abroad, a British subject or a foreigner may, on application to this Court upon attestations, move for and obtain a warrant of arrest of the property in a cause of piracy civil and maritime, or of its proceeds, in a cause of spoliation civil and maritime. (m)

4. In a suit for the *restitution* of goods *piratically* or *illegally* taken on the high seas not as prize in lawful war.

2. The jurisdiction of the Court of Admiralty in cases of *contracts*, express or implied, when they are of a *maritime* nature, is also extensive, as 1st, Between *part-owners* of a ship; 2dly, Suits for *mariners'* and *officers' wages*; 3rdly, Suits for *pilotage*; 4thly, Suits on *bottomry bonds* and *respondentia bonds*; and 5thly, Suits for *salvage* and relating to *wreck*.

2. Jurisdiction of Court of Admiralty in cases of *contracts* express or implied.

1. The jurisdiction of the Court of Admiralty between *part-owners* of *British* ships is in some respects concurrent with that of the Court of Chancery, and in many cases preferable, though in others not so. When the extent of the shares of several co-

1. Part-owners of a ship. (n)

(i) *The Hercules*, 2 Dodson's Ad. R. 369.

Inst. 152.

(k) *Id.* 371 to 377, *Egglefield's Case*, 1 Vent. 173; 2 Keb. 828; *Pelaye's Case*, Bulst. 327; 4 Inst. 152.

(m) *The Hercules*, 2 Dodson's Ad. R. 368, 377.

(n) See observations of Sir C. Robinson as to part-owners of a ship in general, 2 Hagg. Ad. R. 276 to 281.

(l) 3 Bulst. 27; *R. v. Marsh*, and 4

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owners of a ship is fixed or agreed, the Court of Admiralty is, we have seen, (o) open *all the year round* to an application by one or more of several *part-owners* to restrain the others, whether they constitute a *majority* or an *equal* number in interest, from sending the ship on a voyage without the consent of the applicant, until they have given *adequate security* to the extent of the value of the interest of the applicant opposing such voyage, and so as to secure him in case the ship should not safely return, (p) at least to *some* port in England; (q) and previous to taking the security, the value of each agreed share may be ascertained by the marshal of the Court, and which may on affidavit be impeached and increased so as to obtain higher security; (r) and if the ship should be *lost* the Court of Admiralty would *immediately* enforce the payment of the stipulated sum with costs, without regard to any other disputed account between the owners; (s) though possibly if it could be shewn that the applicant had occasioned the loss, that circumstance might induce the Court to suspend adjudication of immediate payment. (t) The applicant, in such a case, will not be liable to any part of the expenses of the *outfit*, nor on the other hand will he be entitled to any *earnings* of the ship during the voyage. (u) We have seen that applications of this nature are considered not to be advisable excepting in cases of long voyages, and not to be expedient when only short or coasting voyages are proposed; however there may be exceptions. (x) An application of this nature may not only be made against an *admitted part-owner*, but also by a claimant of an entire vessel or share against a person whom he insists has no interest and is a mere wrongdoer. (y)

The *course of proceeding* is to obtain a *warrant to arrest* the ship, whereupon, unless the required security be given, she will remain secured in port. (z) If no security be given, then the only course is to file a bill in equity to compel an arrangement between the owners; for the Court of Admiralty has no power over the accounts relative to the ship or to decree a sale of the shares, and it has indeed been supposed that even the Court of Chancery has no such power. (a) If the *minority* happen to

(o) *Ante*, vol. i. 717.

(p) *Per Lee, C. J., Ousten v. Hidden*, 1 Wils. 101; Abbott, 4 ed. 74, 75, and *per* *Ld. Stowell in Apollo*, 1 Hagg. Ad. R. 306, 311. But in the *Egyptienne, Parkmans*, 1 Hagg. Ad. R. 346, a decree of possession was refused to a mere moiety owner.

(q) *Margaret*, 2 Hagg. Ad. R. 275.

(r) *Ib.* in notes.

(s) *Apollo*, 1 Hagg. Ad. R. 306 to 320.

(t) *Ib.* 316, 317.

(u) *Anon.* Chan. Cas. 36; *Boyon v. Sandford*, Carth. 63; Abbott, 71.

(v) *Ante*, vol. i. 717, 718.

(w) *Blanchard*, 2 B. & C. 244; 3 Dowl. & R. 177, S. C.

(x) Abbott, 71.

(a) *The Margaret*, 2 Hagg. Ad. R. 277; but see *ante*, vol. i. 718.

have possession of a ship and refuse to employ it, then the majority also may by a similar warrant obtain possession of it, and send it to sea upon giving such security. (b) But after a decree of possession, and such decree had been executed, the Court of Admiralty declined to interfere further by attachment, on the ground that the decree had been only *formally* and not *beneficially* complied with, and left the complaining part-owner to seek his remedy for perfect possession elsewhere, i. e. in Chancery; and therefore it would seem, that in such disputes and hostile cases a proceeding in a Court of Equity is a more complete remedy. (c)

If the amount of the respective shares be a subject in dispute, (i. e. whether the claimant be entitled to a third, or fourth, or other share, and not merely the *value* of a share,) then the Court of Admiralty will not interfere, and the proper course is to file a bill in Chancery and pray an injunction, restraining the sailing of the ship till the amount of the share, for which security is to be given; shall have been ascertained, and which will probably be referred to a master in Chancery. (d)

An application, either to the Court of Admiralty for security or to the Court of Chancery for an injunction, should be made *promptly* or it will not succeed. (e) But if promptly made it will not be refused, and an injunction may be obtained in five days or less. (f) But the Court of Admiralty does not interfere in cases of *adverse title*, or in favour of a mortgagee of a ship who has neglected to take possession; (g) and the Court of Admiralty will not entertain a suit of this nature between *foreign* owners of a foreign ship, because the foreign law frequently varies from the English law; (h) unless the ambassador or representative of the foreign state has consented to the proceeding. (i)

Nor has the Court of Admiralty any jurisdiction to compel the *sale* of a share in a ship, and if the enforcement of such sale should form part of the object of a suit in that Court, the Court of King's Bench would pro tanto grant a prohibition. (k) Nor has this Court any jurisdiction as regards the settlement of *accounts* between part-owners or partners. (l)

(b) Abbott, 72.

(c) *John of London*, 1 Hagg. Ad. R. 312; *The Margaret*, 2 Hagg. Ad. R. 277.

(d) *Italy v. Goodson*, 2 Meriv. 77; Abbott, 75; *ante*, vol. i. 716.

(e) *Christie v. Craig*, 2 Meriv. 137; *ante*, vol. i. 717.

(f) *Apollo*, 1 Hagg. Ad. R. 307; *ante*, vol. i. 717.

(g) *Christiana*, 2 Dodson's Ad. R. 183.

(h) *Joham v. Seigmurd*, 1 Edw. Ad. R. 242.

(i) *Lec Renter*, 1 Dodson's Ad. R. 22.

(k) Per Lee, C. J., in *Ouston v. Hebden*, 1 Wils. 101; Abbott, 74.

(l) Per Ld. Stowell, *Apollo*, 1 Hagg. Ad. R. 313.

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2. Suits for mariners' wages. (m)

2. Although *mariners' wages* are recoverable by action at law, (n) and by other more summary means, (o) yet the *Court of Admiralty* is in many cases the preferable tribunal, particularly when there are *several* seamen unpaid, or where the owners of the vessel are insolvent; for "all the seamen and officers, excepting the captain or master of a British vessel, may either *singly or jointly* sue in this Court, and *may arrest the ship by its process as a security for their demand*, or the proceeds remaining in the registry;" and they may also cite the master or the owners *personally* to answer their suit in this Court, and this although their wages were contracted for by the usual ships' articles in England. (p) It was so decided, as regards a written agreement for wages signed in England before any enactment; (q) and as well the statute requiring a written agreement in the case of a *foreign voyage*, (r) as that which requires such an agreement in cases of certain vessels employed in the *coasting trade*, (s) contain a clause that no seaman shall, by signing such agreement, be deprived of any means of recovery of wages against any *ship*, or the master or owners, which he then had; and the Court of Admiralty being a Court of Equity does not consider the words in the ship's articles "*binding and conclusive*," in 2 G. 2, c. 36, sec. 2, as applicable to mariners' contracts of a special nature, and they are to be construed most liberally and equitably in favour of seamen, so notoriously ignorant and careless of technical enactments. (t) It has been observed that suits for wages due to mariners of our own country have been said to be entertained by the Court of Admiralty more from a kind of *toleration*, founded upon the general convenience of the practice, than by *any direct jurisdiction properly belonging* to it, although the exercise of such a jurisdiction had existed from the very first establishment of such a Court (u). But if there be a formal and special contract out of the usual form, and by *deed*, then a prohibition might be obtained if applied for in *due time*, so as to prevent the suit on such *deed* from being prosecuted in the Admiralty

(m) We shall not here attempt to state the whole law relative to seamen's wages, and when or not they are forfeited by desertion, &c., for which see *ante*, vol. i. 73, 74; Abbott on Shipping, and Haggard's and Dodson's Admiralty Reports, Indexes, tit. Wages.

(n) 3 Bos. & Pul. 102; *Young v. Nicholas*, 1 Hagg. Ad. R. 201.

(o) 59 G. 3. c. 56.

(p) *Ragg v. Kings*, 2 Stra. 858; 1 Barnard. 297; *Clay v. Snellgrave*, Salk. 33; 1 Ld. Raym. 576; 12 Mod. 403;

Carth. 518; Read v. Chapman, 2 Stra. 937; *The Favorite de Jersey*, 2 Rob. R. 252; *Bins v. Parre*, 2 Ld. Raym. 1206; 1 Holt on Shipping, 462; Abbott, 476.

(q) *Bins v. Parre*, 2 Ld. Raym. 1206; *Mariners' Case*, 8 Mod. 379; Abbott, 478.

(r) 2 G. 2, c. 36, s. 8.

(s) 31 G. 3, c. 39, s. 6; Abbott, 478.

(t) *Minerva*, 1 Hagg. Ad. R. 356, 337.

(u) Per Sir W. Scott, *The Courtney*, 1 Edwards' Ad. R. 240.

Court, unless there have been fraud or deceit; (x) and no Court of Admiralty has jurisdiction over cases of seamen's wages when founded on special and extraordinary contracts, as to be paid part in the produce of a whaling voyage. (y)

Seamen's wages constitute so effectual a charge upon the vessel, that the Court of Admiralty may enforce payment of wages earned by a British mariner under a contract with the British owner of a ship, although the ship itself, previous to its return to this country, may have been transferred to a foreigner in a distant part of the world, especially if the transfer was merely colourable; and this notwithstanding the seamen had executed bonds not to require the wages abroad, nor unless the ship returned to England. (z) And the circumstance of a vessel being employed as a post office packet constitutes no protection from arrest in a suit for mariners' wages, especially if the post office raise no objection to the proceeding as injurious to the interests of the public; (a) and if the ship has been disposed of, and its proceeds remain in the registry of the Court, then the suit may be against such proceeds. (b) It should seem also that although a ship may be in custody of the sheriff under a *fieri facias*, yet the seamen or the mate and several of them may institute a suit for their wages in the Court of Admiralty and have the vessel arrested under a warrant issued from that Court, so as at least to prevent any surplus that would otherwise be paid to the owner from being paid over to him, but still subject to the just claim of the execution creditor; and the Court of King's Bench will not grant a rule calling on the marshal of the High Court of Admiralty to pay over the amount of the sum indorsed on the writ of execution to be levied, though the Court of Admiralty itself, or the Delegates, (or now the Judicial Committee of the Privy Council,) would decree to that effect. (c)

Seamen are not confined in their suits in the Admiralty Courts merely to actual service *at sea*, but may also proceed there for their wages earned in rigging and fitting out a ship for a voyage. (d) They may also sue here for wages of a coasting voyage, or for navigating a vessel from one part of England to another; (e) and if the subject come collaterally before this

(x) 1 Edwards' Ad. R. 240, note (e);
2 Dods. Ad. R. 12; Abbott, 480, 483.

(y) *The Sydney Cove*, 2 Dods. Ad. R. 11.

(z) *Juliana*, 2 Dods. Ad. R. 504.

(a) *Lord Hobart*, 2 Dods. Ad. R. 100.

(b) *Sydney Cove*, 2 Dods. Ad. R. 11.

(c) *Flora*, 1 Hag. Ad. R. 298.

(d) *Wills v. Osman*, 2 Ld. Raym. 1044; 6 Mod. 238; Sayer, 127.

(e) 1 Vent. 343.

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Court in a suit in other respects properly instituted there, the Court may decide whether a place at which a ship has arrived was such a determination of the voyage as to entitle the seamen to wages. (*f*)

Foreign seamen, whose ship is in a British port, may institute their suit against such ship or owner for wages in the Admiralty Court here, with the same advantages as British seamen, but not so if they were hired under a special contract referring to their own foreign law, especially if that law or their own stipulation precludes them from suing their captain for wages elsewhere than in their own country. (*g*) It is usual however in the case of foreign seamen instituting a suit for wages in this Court against the ship and owners, to obtain and verify the consent of the foreign ambassador or consul. (*h*) But the Admiralty Court here will not entertain a suit for three months' wages in advance in a foreign port under a particular stipulation to that effect. (*i*)

As instances of such suits being sustainable by *officers* besides the *ordinary seamen*, (*k*) are suits by boatswains, (*l*) ships' carpenters, (*m*) surgeons, (though recently doubted,) (*n*) or the chief or other mate; (*o*) and a mate, who during a voyage became master by the capture of the former master, was allowed to sue in this Instance Court for his wages *as mate* for the whole time, on the ground that his rights as mate were not merged, though as to any additional remuneration after he became master that must be recovered in a court of law; (*p*) and if a second mate, pending a voyage, succeed to the office of chief mate, his wages are to increase accordingly, and an alteration in the ship's articles is not absolutely necessary to support his title. (*q*) And a suit in the Court of Admiralty may be sustained for subtraction of wages, by a mate against persons who had represented themselves to him as owners of the ship, although there was a pending suit in chancery respecting a

(*f*) *Brown v. Benn*, 2 Ld. Raym. 1247.

(*g*) *The Courtney*, English, 1 Edws. Ad. R. 239; *Johnson v. Mackielson*, 3 Campb. 46; *Dickman v. Benson*, *ibid.* 290; 1 Holt, 464.

(*h*) *Frederick*, 1 Hagg. Ad. R. 138, 140, and cases there cited; *The Courtney*, 1 Edws. Ad. R. 239.

(*i*) *Courtney*, 1 Edws. Ad. R. 239.

(*k*) *Abbott*, 476.

(*l*) *King v. Rigg*, 2 Stra. 256; 1 Barnard. 297.

(*m*) *Wheeler v. Thomson*, 1 Stra. 707;

see observations of Sir W. Scott, the *Lord Hobart*, 2 Dods. Ad. R. 104.

(*n*) *Mills v. Long*, Sayer, 136, *sed quare*; see *Lord Hobart*, 2 Dods. Ad. R. 104, 105, and note.

(*o*) *Bayley v. Grant*, 1 Ld. Raym. 3632; Salk. 33; *Reed v. Chapman*, 1 Ld. Raym. 937; *The Favorite*, 2 Rob. 237; *Robinett*, *ibid.* 261; *The Lord Hobart*, 2 Dods. Ad. R. 104.

(*p*) *The Favorite*, 2 Rob. R. 232; *The Bataria*, 2 Dods. Ad. R. 503.

(*q*) *Providence*, 1 Hagg. Ad. R. 391.

contest who were really entitled as owners. (r) And a *female* who assumes the garb and appearance of a sailor, and is hired as such, may, in the absence of fraud, recover stipulated or reasonable wages precisely as a male seaman. (s)

But it has been repeatedly decided that a *master* of a vessel cannot proceed for his wages in this Court, because he is supposed to stand on the security of his personal contract with his owner, not relating to the bottom of the ship. (t) But even in the case of the master, if he have obtained a sentence in the Court of Admiralty upon the usual allegation stating that he was hired within the jurisdiction of that Court, the Courts of Westminster Hall will not prohibit the execution of the sentence, for the motion for a prohibition should have been made at an earlier period. (u) If a *master* of a ship improperly sue in the Admiralty Court for his wages, and thereupon a prohibition issue upon a suggestion that the contract for wages was made *on land*, the Court of King's Bench will not compel the defendant to find special bail to the action in that Court. (x)

In a mariner's suit for wages every question of right to the same and of *forfeiture* thereof by *desertion*, (y) *mutiny*, or insolent expressions and acts of mutinous tendency not apologized for, (z) may arise, and be discussed and determined in this Court, some of which we have adverted to, and we have seen that a master not providing adequate food is a sufficient cause for leaving the vessel without forfeiting wages. (a) A single act of intemperance or misconduct will not in general forfeit the wages even of a mate or other ship's officer, it must be a *habit* to produce that effect; (b) and *impressment* is not equivalent to desertion unless collusively obtained, and the mariner is entitled to wages for the time he actually served, and indeed for the whole time, if he can prove that the master maliciously caused him to be impressed. (c) In a suit by a mate for wages it has been recently decided, that if a part of the cargo has been lost by his negligence or improper interference, the owners

(r) *St. John*, 1 Hagg. Ad. R. 334.

(s) *Jane and Matilda*, 1 Hagg. Ad. R. 187, where Lord Stowell gives a spirited detail of the valuable public services that have been performed by females.

(t) Per Sir W. Scott, in the *Favorite*, 2 Rob. 237; Bac. Abr. Prohibition, B.; *Clay v. Mulgrave*, 3 T. R. 315; *Wellthinson v. Ormsly*, *ibid.*

(u) *Barber v. Wharton*, 2 Ld. Raym. 1452; *Buggin v. Bennett*, 4 Burr. 2035; *Abbott*, 479, 480; 1 Holt, 463.

(x) Bac. Abr. Prohibition, B; *Clerk*

v. Mulgrave, 3 T. R. 315; *Wellthinson v. Ormsly*, *ibid.*

(y) *The Amphitrite*, 2 Hagg. Ad. R. 403; *The Jupiter*, 2 *id.* 221.

(z) *The Susan*, 2 *id.* 229, in n.; *The Amphitrite*, 2 *id.* 403.

(a) *Castilia*, 1 *id.* 59; *Bulmer*, *id.* 163; *Jane and Matilda*, *id.* 187; *ante*, vol. i. 73, 74.

(b) *The Exeter*, 2 Rob. 264; *Matta*, 2 Hagg. Ad. R. 168.

(c) *The Jack Park*, 4 Rob. 308; *The Amphitrite*, 2 Hagg. Ad. R. 403.

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may deduct the amount from his wages, (d) though we have seen that the common law does not in general allow any deduction from a servant's wages on account of breakage or damage committed by such servant. (e)

In a suit of this nature against the ship *in specie*, if the value thereof be insufficient to discharge *all* the claims upon it, then the *seaman's* claim for his wages is preferred before all other charges. (f)

(d) *The New Phoenix*, Admiralty Court, 14 Feb. 1833. This was a question of some interest as regards the responsibility of seamen to make good damage done by them, by accident or negligence, to goods forming part of the freight of the vessels to which they might belong.

The King's Advocate said he appeared on behalf of the mate of the *New Phoenix*, for the subtraction of wages due to him for his services. The mate was engaged to proceed with the vessel to Jamaica, to take in a cargo, and the question was, whether he was liable for the loss occasioned by an accident that had happened to a hogshhead of sugar, which had, while being conveyed from the wharf to the ship's boat, fallen overboard in Jack's-bay, Jamaica? The owners had refused to pay the wages due to the mate, and the present action was commenced. The learned advocate stated the facts, and contended that, as a mere accident had happened, the mate ought not to be responsible and incur the loss of his wages. There was no charge of improper conduct on the part of the mate.

Dr. Addams, for the owners, contended that the Court must arrive at the legal conclusion, and if the owners did not succeed in this case, it would be almost impossible for owners of vessels to protect themselves from the consequences of the negligent conduct of seamen. The principle of law adopted by the Court was, that if merchants claimed of the owners satisfaction for damage done to goods in their custody on freight, the owners had a right to deduct the amount of loss from the seamen's wages. His learned friend had argued that this was a case of accident, but he should contend that it was a case of negligence, and the Court knew perfectly well that accidents were generally occasioned by negligence. He was ready to admit there was no *malus animus* in this case, but, by the negligence of the mate, the hogshhead of sugar had fallen into the sea, while it was being hoisted into the ship's boat, in the absence of the wharfinger, who would have been responsible for the damage had he been present, and it being a rule in Jamaica not to remove goods in the absence of this responsible person. He (Dr. Addams) referred to the evidence in the cause, and felt

assured that the Court would consider that the mate ought to bear the loss incurred by the damage done to the sugar.

Sir C. Robinson said this was a case in some degree novel, and he did not understand that it had before been raised by any one. It is one of that class of cases; however, which, though it did not involve any considerable amount of property, was one of considerable importance with regard to the principle which, for the interest of navigation, was generally preserved within very strict rules. The conduct of those who had the care of ships and goods on board was matter the Court should strictly guard. This principle ran through all the maritime law of the country at all times. On the admission of the allegation he had expressed himself that by nothing short of the grossest negligence could the owners hope to establish their case; but the sense in which he applied that term, as compared with misconduct, differed where parties had disregarded the general rules that ought to have been observed. All the evidence shewed that it was not the custom of the trade, in the absence of the wharfinger, who was held responsible for the safe delivery of goods on board ship, to remove any merchandise. The evidence shewed that this responsible person was absent, and he should be disturbing the rules of navigation if he did not maintain them. It was argued that the occurrence was a mere accident, but the mate should have considered his duty to other parties, and not have disturbed the responsibility of the law, which was on the wharfinger. It might be said the owners had acted illiberally; that was no business of the Court's; for the interests of commerce it was necessary to protect the principle of law that the owners of vessels are entitled to deduct the losses occasioned by seamen by their negligent conduct. The question had been tried to establish the principle. He considered the owners had a right to deduct the loss from the wages of the mate.

Dr. Addams applied for costs, but the Court said it could not grant the application.

(e) *Ante*, vol. i. 78, note (e); and *Le Loir v. Bristow*, 4 Campb. 134.

(f) *Abbott*, 484; and see observations in *The Sidney Cove*, 2 Dodson's Ad. R. 13.

But suits in the Admiralty for wages, like actions at law, are particularly limited to *six years*, in the absence of 'any deed, with exceptions in favour of infants, femmes covert, and parties imprisoned. (g) Upon which it has been observed, that inasmuch as such suit affects the ship itself, which may have been afterwards purchased, the time allowed is much too long, and it would be advisable, at least as regards the process against the *ship*, to adopt the French ordinance, which allows only one year. (h)

In a suit for wages it is always essential to make a tender of a sufficient sum and of costs up to the time of tender, by *act of Court* and not merely by *verbal* tender to the party. (i) If the tender turn out to have been inadequate, and especially if there have been any attempt to attack the character of the claimant, as for inattention or mutiny, the Court will award liberal remuneration and all expenses. (h) The suit for seamen's wages, whether at the instance of one or several, may be by *summary petition*, and thereupon the owner or defendant in due time delivers in his *defensive allegation*. (l)

In a suit of this nature the master is a competent witness, and compellable to give evidence on their behalf, although he himself, as master, might be separately sued. (m)

Although we have seen that the value of damages occasioned by a mate or mariner to a part of the cargo may be deducted from his wages; (n) yet it appears to have been considered that neither under the statutes allowing a set-off at law or otherwise can a *set-off for a cross debt* be pleaded or offered as a deduction against a mariner's suit for wages; and, therefore, where a mate sued in the Admiralty Court for wages, and the owner pleaded a set-off for the passage-money of the mate's wife, the Court rejected such allegation and pronounced for the wages and costs. (o)

In an early part of this volume we adverted to Lord Stowell's observations on the duties of proctors when concerned for mariners or other parties in claims of this nature, especially as respects their *personal* interference in order to prevent litigation, or they may incur censure, and perhaps be obliged to pay costs. (p)

(g) 4 Ann. c. 16, s. 17, 18 and 19.

(h) Abbott, 484, 485, note (k).

(i) Per Sir Wm. Scott, *Vrouw Margarettu*, 4 Rob. 106, 107.

(k) *Porcupine*, 1 Hagg. Ad. R. 378.

(l) *Minerva*, 1 Hagg. Ad. R. 247; *Harcourt*, id. 248; *Frederick*, *Neptune*, id.

212, 227.

(m) *Lady Ann*, 1 Edward's Ad. R. 235.

(n) *Ante*, 524, n. (d).

(o) *Lady Campbell*, 2 Hagg. Ad. R. 14, in note.

(p) *Frederick*, 1 Hagg. Ad. Rep. 219, 221, 225; *ante*, this volume, 23, 24.

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Summary power of a justice of the peace to decide upon a claim of wages not exceeding 20*l.* under 59 G. 3, c. 58. (q)

The statute, 59 G. 3, c. 58, empowers a justice of the peace, on the *complaint* of a seaman, to settle disputes about wages *not exceeding 20*l.**, and the decision of the justice or justices is to be final, unless an *appeal* to the Court of Admiralty is interposed by either party within *seven days* after the justice's order was made; and by sect. 2, *notice of appeal* is to be given in writing within *forty-eight hours* after the order of the justice is made, and a monition is to be taken out against the adverse party within *thirty days* from the date of such order, and *bail* in double the amount of wages claimed is to be given; and by sect. 4, seamen are not deprived of any other remedy to which they may resort. It has been held on this act, that in case of an appeal to the Court of Admiralty the appellant is to begin in that Court by setting forth his act and complaint on petition. (r)

3. Suits for pilotage.

The Court of Admiralty has in some cases jurisdiction over questions of *pilotage*. The statute of 6 G. 4, c. 125, s. 87, expressly provides, that the provisions of that act shall not affect or impair the jurisdiction of the Court of *Load Manage* or High Court of Admiralty; but it was determined that a charge for pilotage under the old statute, where the service was performed in a *river* within the body of a county, could not be recovered by a suit in the Court of Admiralty. (s) Sometimes where a pilot has interfered to save a ship, it may be difficult to say whether he be entitled to salvage as well as pilotage; but generally speaking the services are quite distinct, and if a pilot without pretence claim salvage, his petition will be dismissed with costs. (t) Pilots are not entitled to charge as *lay days* the days on which they enter and on which they leave a place of quarantine. (u) But extra pilotage may become payable for extraordinary pilot service or even salvage. (x)

4. Bottomry bonds. (y)

This Court also has a peculiar and unquestionable jurisdiction, (exclusively so as regards the proceeding *in rem* against the *ship itself*;) in case of *bottomry bonds* and other deeds of *hypothecation*, being in the nature of a mortgage of the ship, as a security for money lent or expended upon her, without reserving any claim against the owners in person, and usually made

(q) And see decision thereon, *Minerva*, 1 Hagg. Ad. R. 54.

(r) *Minerva*, 1 Hagg. Ad. R. 54, note †.

(s) *Ross v. Walker*, 2 Wils. 264.

(t) *The Joseph Harvey*, 1 Rob. 306.

(u) *The Bee*, 2 Dodson's Ad. R. 498.

(x) *The Enterprise*, Crobie and Columbus *Nerroll*, 2 Hagg. Ad. R. 178, in notes.

(y) See jurisdiction of Admiralty Court over bottomry bonds, the *Rhadamanthe*, 1 Dodson, Ad. R. 203.

by the master abroad, and stipulating that the money advanced, together with the agreed premium, shall be paid within a stipulated number of days after the safe arrival of the vessel at a named port of discharge in England, (z) or, as it is said, should be conditioned for her safe arrival at *any* port within the admiralty jurisdiction. (a) To entitle the lender abroad to proceed against the ship itself, there must be a *written instrument of hypothecation*, and bills of exchange drawn by the master as a security for money advanced to him, though accompanied with a *verbal* engagement from him that the ship shall be liable, will not suffice. (b) The principle upon which bottomry bonds are sustained, although they in general reserve very high profit for the use of the money, is, that the loan is made entirely on the credit of the vessel when in a state of distress in a foreign country, and where the master has neither money nor funds nor personal credit. (c) When bona fide executed under such circumstances, the bond may be sustained in part although it may be invalid in other respects. (c)

Upon the arrival of the ship in this country, if the loan and premium be not paid within the time prescribed, the agent of the lender applies to the Court of Admiralty with the *bond* or other contract and a proper *affidavit* of the facts, and obtains a *warrant to arrest* the ship and *cite* all persons interested to appear before the Court; and such *citation* is generally made by posting a copy of the warrant upon some part of the ship. (d) If in the course of the proceedings it should become necessary to sell the ship, the Court will *decree a sale* to be made under the direction of its own commissioners, and will afterwards distribute the proceeds among the different claimants as justice requires; and this may be done if the owners or persons interested in the ship do not appear at the time appointed by the Court, otherwise their absence or default would occasion a failure of justice. (e) If there be *several* claimants of the same nature, though at law the *first* mortgagee of land is preferred and must be first satisfied, in this Court the *last* obligee is first to be paid, provided the advance was absolutely essential, on the principle that the last loan furnished the means of preserving the ship, and without it the former lenders might entirely have

(z) Form of bottomry bond, Abbott, 487, and the grounds of the Court of Admiralty jurisdiction over it. The *Rhadamanthe*, 1 Dodson, Ad. R. 203; *Alexander*, id. 278; *Atlas*, 2 Hagg. Ad. R. 48.

(a) *Alexander*, 2 Hagg. Ad. R. 278.

(b) 3 Ves. & B. 135; 19 Ves. 474; 2 Rose, 194, 229; Abbott, 126.

(c) See per Ld. Stowell, *Nelson*, 1 Hagg. Ad. R. 175.

(d) Abbott, 126.

(e) *Ibid.* 126, 127.

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lost their security. (f) But unless it be established that the last loan was essential for the preservation of the vessel, the first security will be preferred. (g) And claims for *mariners' wages* are always preferred to bottomry bonds. (h) Although the lender's taking undue advantage of a ship's distress and exacting an exorbitant premium for the loan, cannot amount to usury on account of the principal being in risk; yet the Court of Admiralty has jurisdiction to *reduce* the stipulated premium; though in the exercise of such jurisdiction it will act with great caution and liberality. (i)

5. Suits and
proceedings for
Salvage. (k)

The Court of Admiralty has also extensive jurisdiction, as well *original* as appellate, from the decision of justices or arbitrators, in questions of *Salvage*, which is the compensation to be made to persons by whose assistance a ship, or its freight, or its loading, has been saved from impending peril or recovered after actual loss. (l) There are in general several modes of proceeding for salvage, viz. 1st. a claim and suit in the admiralty Court; 2dly, an action at law; 3rdly, some regulations extending throughout the whole kingdom, authorizing *three* justices of the peace or their nominee to award the amount of salvage, (m) and either party may, within ten days after such award, state his desire to obtain the judgment of the Court of Admiralty respecting the salvage, and thereupon the salvor must, within thirty days after the award, take out a monition and proceed in the Admiralty, and the owner is, upon good security, to have the possession of the property seized. (n) 4thly, Questions of salvage arising within the particular limits of the *Cinque Ports* are regulated by different statutes. (o)

In all cases the *right* to Salvage or the *quantum* may be tried by a jury in an *action* in a Court of law. (p) But if the salvage has been performed *at sea*, (q) or between high and low water

(f) *Bynkershook*, Quest. Jur. Pub. Lib. 1, c. 19; *Abbott*, 128.

(g) *Rhadamanthe*, 1 Dod. Ad. R. 201; *Betsy*, *id.* 289.

(h) *The Madonna D'Idra*, 1 Dodson, Ad. R. 40; *The Sydney Cove*, 2 Dodson, Ad. R. 1. 13; *Duke of Bedford*, 2 Hagg. Ad. R. 294.

(i) *Cognac*, 2 Hagg. Ad. R. 377.

(k) See in general 3 Chitty's Com. Law, 440 to 445.

(l) *Abbott*, 397; what slight interference can scarcely be deemed salvage, *Henry*, 1 Hagg. Ad. R. 264.

(m) 49 G. 3, c. 122, s. 5 & 8, and 1 &

2 G. 4, c. 75, s. 4 & 7. See construction of the latter act in *Jonge Nicolas*, 1 Hagg. Ad. R. 201 to 210.

(n) 49 G. 3, c. 122, s. 10, and 1 & 2 G. 4, c. 75, s. 10.

(o) *Abbott*, 411; 1 & 2 G. 4, c. 76. See an instance of a successful appeal from an award of Cinque Port commissioners, *Henry*, 1 Hagg. Ad. R. 264.

(p) *Abbott*, 398.

(q) *Abbott*, 399. The jurisdiction of the Court of Admiralty extends in the *Thames* no higher up than Black Tail Sand, *The Hercules* cited in *The Eleanor*, 6 Rob. Rep. 39.

mark, (r) the Court of Admiralty unquestionably has jurisdiction over the subject and is enabled most satisfactorily to fix the sum to be paid without the intervention of a jury, and usually the judge acts with the assistance of one or more experienced persons, members of the Trinity House. (s) And this Court adjusts the proportions of salvage to be paid amongst the salvors, and the property is secured pending the suit, and if a sale be necessary such sale will be directed and the proceeds divided between the salvors and the proprietors according to equity and reason. (t) In fixing the rate of salvage this Court usually has regard not only to the labour and peril incurred by the salvors, but also to the situation in which they happen to stand with respect to the property saved, to the promptitude and alacrity manifested by them, and to the value of the ship and cargo, as well as the degree of danger from which they were rescued. (u) So in regard to the proportion of remuneration, there are many cases in which there is much labour and little to pay for it, so that the Court acts upon the principle of giving a *larger* proportion in cases of *small value* than in cases where the property is considerable, as a due encouragement to the interests of the commerce and navigation of the country. (x) Thus, one-sixth of the value of the ship and freight was allowed, both having been saved by the salvors, (y) so one-seventh, (z) one-tenth, (a) and two-fifths, (b) or even two-thirds, (c) where the crew had deserted the vessel; and even a *moiety*, in another case of capture and desertion and salvage with great risk, trouble, and discretion, was allowed; (d) but in no case it is said more than half. (e) In a late case, Sir W. Scott said, "It is the practice of this Court, when the property is of small amount, to award a *larger* proportion of the value of the ship and cargo; but where the property is of greater value the Court always conceives a less proportion is sufficient, and where it is of vast

(r) 1 & 2 G. 4, c. 75, s. 31; in *The Two Friends*, 1 Rob. R. 283, Sir W. Scott seems to suppose that the Instance Court may be ousted of jurisdiction by the salvors having been amused by negotiations as to the amount of salvage, until the goods have been landed and have then defied the jurisdiction of the Court of Admiralty: *sed quare* how such a fraudulent stratagem could have such effect. *Semble not*.

(s) As in *Mary Ann*, 1 Hagg. Ad. R. 158.

(t) Abbott, 399.

(u) Abbott, 489; *The William Beckford*, 3 Rob. 355; and see the principle of calculating remuneration, per Ld. Stowell

in *Mary Ann*, 1 Hagg. Ad. R. 158; *The Sarah*, 1 Rob. 313, in notes; *The William Beckford*, 3 Rob. 355, where the property saved was worth 17,604*l.* only 1500*l.* was allowed salvage.

(r) Per Ld. Stowell in *Mary Ann*, 1 Hagg. Ad. R. 160.

(y) *The Dorothy Foster*, 6 Rob. 88.

(z) *The Henry*, 1 Edward, Ad. R. 192.

(a) *The Trelawney*, 4 Rob. 225; *Mary Ann*, 1 Hagg. Ad. R. 158.

(b) *The Fortuna*, 4 Rob. 193.

(c) *The Jonge Bastianna*, 5 Rob. 322.

(d) *The Elliotta*, 2 Dodson, Ad. R. 75; *the Blendenhall*, 1 Dodson, Ad. R. 422, 423.

(e) *Frances Mary*, 2 Hagg. Ad. R. 89.

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extent a moderate proportion may reasonably be considered as a competent reward ;" (*f*) and where the vessel and cargo saved were worth 275,000*l.*, only 4000*l.* salvage with expenses of the suit were awarded against the East India Company, and in these proportions, 2000*l.* to the owner, 500*l.* to the commander, and 1500*l.* amongst the rest of the officers and crew, in the same manner as prize proceeds would have been distributable amongst them. (*g*)

So by the law of England *King's ships* are entitled to a like salvage remuneration for services rendered to merchant vessels in distress, as other salvors, and this notwithstanding the crown may have a considerable interest in the revenue that would be received on the safe arrival of the ship, and in that respect it may be a duty of the crew of a king's ship to interfere more than indifferent persons ; (*h*) but it would be otherwise if the king's ships and merchant ships were at the time associated in a joint expedition. (*i*) It seems not to have been formally decided whether a foreign ship of war lying in a port of this country is liable to the civil process of the Court of Admiralty here, in a cause of salvage at the suit of British subjects. (*k*)

The crew of a vessel cannot have a sustainable claim for salvage *eo nomine* in any case whilst their duty to protect the vessel continues. (*l*) But by *saving* a part of the ship he will thereby be entitled to a *proportion of his wages* although the voyage and freight be wholly lost ; so that in effect he obtains remuneration for his exertion in saving the property. (*m*) So under ordinary circumstances a *passenger* cannot be entitled to salvage ; but if he preserve the ship after the master and part of the crew have deserted, it might be otherwise. (*n*)

To assist the right of the salvor he has a *lien* on the property saved at sea, (*o*) though it would be otherwise in a river, (*p*) and may retain the same until an adequate *tender* has been made ; but if he should reject a proper tender he might then, at his peril of paying damages as well as costs for the wrongful detention, have to defend an action of trover or

(*f*) *The Waterloo*, 2 Dodson, Ad. R. 442.

(*g*) *Id.* 443.

(*h*) *Mary Ann*, 1 Hagg. Ad. R. 158.

(*i*) *Belle*, 1 Edwards, Ad. R. 66 ; and *Francis and Eliza*, 2 Dods. Ad. R. 115.

(*k*) *Prins Frederick*, 2 Dods. Ad. R. 451.

(*l*) *Governor Raffles*, 2 Dods. Ad. R. 14.

(*m*) *Neptune*, 1 Hagg. Ad. R. 227 ;

and per Lord Stowell. It is a maxim that "a seaman has a right to cling to the last plank of his ship in satisfaction of his wages, or part of them."

(*n*) *Newman v. Walters*, 3 Bos. & Pul. 612 ; *Abbott*, 401, 402 ; when no claim, *The Blendhall*, 1 Dods. Ad. R. 420.

(*o*) *Abbott*, 398.

(*p*) 2 Hen. Bla. 294 ; 1 *Ld. Raym.* 393 ; 8 *East*, 57 ; 1 *Saund. Rep.* 265.

detinue. (q) But it is not by any means necessary to assert the right of lien, and it is an ill-founded and absurd notion that unless salvors stick by the ship they forfeit or in the least impair their title to remuneration, for it is quite unnecessary for the salvor to remain on board or otherwise assume any control over the ship; (r) and where the ship is British and the owners known to be responsible, especially if the claim for salvage is small, it is advisable to remove from all control over the vessel, and prosecute the claim for salvage in due course in the Admiralty or otherwise; and they may not only institute a suit *in rem* against the ship, but also against the owners, so as to affect them personally. (s)

Supposing that the parties cannot agree upon the amount of salvage, then the salvor should *enter his claim* in the Court of Admiralty, and then the owner of the property saved should, in order to avoid the expense of further proceedings, make an adequate *tender* by *acts of Court*, and not merely personally and verbally to the claimants, and also by such act offer to pay the costs already incurred. After such precautionary measures of the owner the salvor would proceed at his peril as respects the costs; for then, if the Court should finally determine that the sum tendered was sufficient, the salvor would not only have to bear his own costs but also pay costs to the owner, if it should appear that the proceedings have been vexatiously pursued. (t) In case of a claim for salvage the owners of the saved ship may take the same on bail at an appraised value, after which the Court, on motion, will not reduce the rate of salvage on the ground that it exceeded the net proceeds, owing to the expenses attending the sale, for the owner and not the salvor incurs the risk of such expenses. (u)

Although strictly speaking the Court of Admiralty has no jurisdiction over questions of *wreck*, (x) yet incidentally in suits for salvage the Court has jurisdiction. In the case of the *Augusta*, Lord Stowell observed that property of the description of *wreck* may by the general law be acquired beneficially

(q) Abbott, 398; and see statute 1 & 2 G. 4, c. 75, s. 37, *id.* c. 76, s. 19, as to tender, &c.

(r) Per *Ld. Stowell*, 1 Hagg. Ad. R. 156; and see *Trelawney* and *The Hope*, 3 Rob. 215, 216.

(s) *The Hope*, 3 Rob. 215, and case in notes.

(t) *The Vrouw Margareta*, 4 Rob. 103; *Eleanora Charlotta*, 1 Hagg. Ad. R. 156.

(u) *The Betsy*, 5 Rob. R. 295, and cases there cited.

(x) 3 Bla. C. 106; and see observations of Sir W. Scott in *The Two Friends*, 1 Rob. 283.

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for the crown ; it is therefore very properly in the first instance placed in the custody of the Admiralty. The proctor of the Admiralty interposes for its protection until a claim is given, but as soon as a lawful owner appears, he (the proctor) withdraws his claim, and the right of the crown to the property is then gone, the ship and goods are restored, *but the charges of the Admiralty are still to be paid*. The disbursement of the officers of the crown are made for the preservation of the property, when that is claimed they are entitled to be indemnified ; and therefore in that case Lord Stowell decreed 100% as a remuneration, somewhat in the nature though not strictly as salvage, with costs, and decreed a sale of a sufficient part of the property to pay the amount. (y)

When the Court of Admiralty has not jurisdiction.

The Court of Admiralty has no jurisdiction to enforce a claim of *lien* on a ship or her stores, for repairs or stores found in this country, or for any claim of the master ; and if such a proceeding should be instituted, a prohibition may be issued from the Court of King's Bench ; (z) and indeed, as regards necessities provided *abroad* for a ship, unless she was *expressly* hypothecated, there will be no direct lien or claim upon the ship, excepting that it may be seized and sold upon a *feri facias* in satisfaction of a judgment at law. (a) It seems however that there is a decision tending to create an exception to this rule in the case of a *foreign* ship, which had been provided with stores in England, and in which the creditors here were allowed by this Court to receive their claims out of the balance of the proceeds of such foreign ship then being in the Court. (b) We have seen that in general this Court has no jurisdiction over *ordinary contracts*, as in case of a *bond* executed on ship board to pay money in London ; nor in general in any case of a *sealed instrument*. (c) Bottomry bonds and other instruments of hypothecation constitute exceptions.

Nor for Mortgagee of a ship ; or a person claiming title.

It seems that the Court of Admiralty will not interfere in favour of a mortgagee of a ship who had not taken possession, and, therefore, where a vessel had been sold under a decree of

(y) *Augusta*, 1 Hag. Ad. R. 20, 21.

(z) *Abbott*, 110.

(a) *Id.* ; see the second reason in *Justin v. Ballam*, Salk. 34 ; 2 Raym. 805 ; *Watkinson v. Bernardiston*, 2 P. Wms. 367 ; *Hussey v. Christie*, 13 Ves. 594 ; 9

East, 426 ; *Abbott*, 115 ; and as to the necessity for *express* hypothecation, *Abbott*, 117, 126, and *ante*, 527.

(b) *The John*, 3 Rob. 288.

(c) 3 Bla. C. 107.

the Court in a suit for subtraction of wages, the Court could not order the surplus of the proceeds to be paid to a mortgagee, to whom possession had never been given; but the Court directed such surplus to remain in the registry, subject to such order as might come to the Court; (d) or the surplus may be invested in Exchequer bills to abide any such order. (e) So the Court of Admiralty does not interfere in cases of *adverse title*; nor does 6 G. 4, c. 110, extend its jurisdiction, or make ships more absolutely transferable under a conditional bill of sale for the purpose of security than before; and, therefore, a warrant of arrest for the purpose of transferring the possession to the holders of such a bill of sale was refused. (f)

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It has been said by high authority, that the proceedings of the Admiralty Court are according to the method of the *civil*

Course of proceedings in the Admiralty Court. (g)

(d) *Portsea*, 2 Hagg. Ad. R. 84.

(f) *Fruit Preserver*, 2 Hagg. Ad. R. 181.

(e) *Owen*, 2 Hagg. Ad. R. 88, in notes.

(g) The following forms of proceedings in the *Admiralty Instance Court*, principally in a mariner's suit for wages, &c. in order to arrest the ship as a security, will assist in shewing the forms and course of proceedings in that Court.

Admiralty Instance Court.

Susanna—A. B. Master.

Appeared personally C. D. now of Plymouth, in the county of Devon, mariner, and made oath that he served as seaman on board the merchant ship *Susanna*, of the port of Plymouth, whereof A. B. then was and still is acting master, [or "whereof E. F. was sailing or acting master,"] from the — day of — A.D. 1833, to the — day of August, A.D. 1834, at the rate or wages of £4 per month, and that there is now justly due and owing to him, this deponent, the sum of £60, being the balance of wages due to this deponent for his services on board the said ship; and that he hath not been able to obtain the same, notwithstanding repeated applications have been made by him, this deponent, for the payment and satisfaction thereof.

On the — day of — 1834, the said
C. D. was duly sworn to the truth hereof before
me,

C. D.

G. H. Surrogate.

1. Form of affidavit to lead a warrant of arrest.

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith. To A. B. Marshal of the High Court of our Admiralty of England, and to his deputy whomsoever, greeting: We do hereby empower and strictly charge and command you jointly and severally that you omit not by reason of any liberty or franchise, but that you arrest or cause to be arrested the ship or vessel called the *Susanna*, whereof A. B. now is or lately was master, her tackle, apparel and furniture, wherever you shall find the same; and the same so arrested you keep under safe and secure arrest until you shall receive further orders from us, and that you cite at the premises all persons in general who have or pretend to have any right, title or interest therein, to appear before us or the judge of our High Court of Admiralty of England or his surrogate, in the Common Hall of Doctors' Commons, situate in the parish of St. Benedict, near Paul's Wharf, London, on the default day after [Trinity] term, to wit, the — day of — next ensuing, between the usual hours for hearing causes, there to answer unto C. D. late a mariner on board the said ship or vessel, in a cause of subtraction of wages, civil and maritime: and further to do and receive in this behalf as unto justice shall appertain, and that you duly certify us or our said judge or his surrogate what you shall do in the premises together with these presents. Given at London in our aforesaid Court under the seal of the same for causes, the — day of — A.D. 1834, and of our reign the fifth.

2. Warrant thereupon to arrest the ship for the arrears of wages.

Action £

L. S.

A. B.

Registrar.

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law, like those of the Ecclesiastical Courts, and that upon that account it is usually held at the same place with the superior

3. Summary petition or libel for wages.

Admiralty Instance Court. -

On the — session of — term, to wit, the — day of — A.D. 1834, before the Right Honourable the Judge.

The *Susanna*. A. B. Master.

C. D. late mariner of the above-named ship } On which day E. F. in the name
Susanna, whereof A. B. now is or lately was the } and as the lawful proctor for the
owner of the said ship, in a cause of subtraction } said C. D., and under that deno-
of wages, civil and maritime, against E. F. of — } mination and by all better and
more effectual ways, means and methods, and to all intents and purposes as the law
that might be most beneficial to his said party doth say and allege, and in law articu-
lately propound as follows, to wit:—

First, That sometime in or about the 1st day of January, A.D. 1833, the said ship or vessel *Susanna*, whereof the said A. B. was lately master, being then in the port of London, and designed on a voyage to — and elsewhere, the said E. F. the owner, did by himself or agent, on the high and open seas, and within the flux and reflux thereof, and within the jurisdiction of the High Court of Admiralty, ship and hire the said C. D. to serve as (mariner) on board the said ship on her then intended voyage, &c. &c. [N.B.—Here follows the rate of wages, shewing the contract of the hiring, &c. That on the said 1st of January, 1833, he entered on board the said ship and into the service thereof, and on the — day of the said month of January signed the usual ship's articles or mariner's contract. [Then follows the statement of the ship's departure, and where she went, and shortly all she did to the time of the discharge of the party engaged. Then stating that he did his duty during such time, &c. That he hath made application to the owner for payment and without success, and then adds, "and so much the said E. F. the owner doth know, and in his conscience believes to be true, and the party proponent doth allege and propound of any other time or times, place or places, hour or hours of the person or thing as shall appear from proofs to be made in the cause, and every thing this article contained jointly and severally.

Second, If there were any specific agreement between the parties as to any particular mode of payment, as for instance, the person engaged leaving an order for his wife in England to receive so much monthly from the owner, or as the case may be, here state the result of such agreement, and what she actually received, and then shewing the balance due, &c.

Third, That in supply of proof of the premises in the next preceding articles mentioned, and to all intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex and prays to be here read and inserted and taken as parts thereof a certain paper writing marked No. 1, which he doth allege and propound to be the original certificate of service of the said C. D. given him by the said A. B. master; [and also another paper writing marked No. 2, which he doth allege and propound to be the original certificate as to the retention of the sum of £ — out of the wages of the said C. D. to answer for the payments in the said monthly note or order left by C. D. to his wife, &c.] And that the whole body, lines and contents of the said certificate, and the respective subscriptions thereto were and are of the proper handwriting of the said A. B. the master, and are so well known and held to be by divers persons of good credit and repute who have frequently seen him write, and write and subscribe his name, and are thereby become well acquainted with his handwriting and subscription.

Fourth, That all and singular the premises were and are true.

Malta, July, A.D. 1834.

No. 1. Certificate of due service of the mariner referred to in libel, and to be annexed.

This is to certify that C. D. served as a mariner on board the ship *Susanna* from the date of — day of January, 1833, [the day of signing the articles] until [day of discharge], during which time he behaved himself properly, and was always obedient to command.

A. B.

Master.

Malta (same date.)

No. 2. Another like certificate.

This is to certify that I have stopped £ — from C. D. for monthly money presumed to have been paid in London, and that the said C. D. is entitled to that sum or any part thereof which may not have been paid by E. F. the owner.

A. B.

Master.

Ecclesiastical Courts at Doctors' Commons in London.(g) But although *some parts* of the practice of the civil law may have been adopted, yet there is *much more* wholly independent of the civil law course of proceeding; and in particular the judge of the Admiralty Court may, as well in civil as in criminal cases, have the assistance of a jury;(h) although, at least in suits for collision, he usually decides upon his own view of the facts and law, after having been assisted by and hearing the opinion of two or more Trinity Masters which vessel was to blame.(i)

In some cases, as in the instance of collision of ships, whether British or foreign, the 1 & 2 G. 4, c. 75, s. 22, allows a *summary application* to any judge of either of the Courts of Record at Westminster, or to the judge of the Court of Admiralty, and upon either being satisfied that damage has arisen by the misconduct or negligence of the master or mariners of a *foreign ship*, such judge may cause the *foreign ship* to be arrested and detained until the master or owner or consignee of such vessel shall undertake to appear to the suit for the collision, and find sufficient bail for all costs and damages; and

Admiralty Instance Court.

On the — day of — term, to wit, on the — day of November, A.D. 1834.

The Emily. A. B. Master.

C. D. formerly a mariner belonging to the said ship Emily, against the same, in a cause of subtraction of wages, civil and maritime.

ship or vessel, and under that denomination and follows, to wit:—

First, That the said ship Emily, during the time the said C. D. belonged thereto, was the property of the said E. F.

Second, That whilst the said ship Emily was at — the said C. D. &c. [shewing here the bad conduct of the said C. D. amounting to mutiny or desertion, or other ground of forfeiture of wages, and such other matter shewing that the articles of agreement were substantially broken, and all other matters calculated to support and insure the defence.]

Third, That all and singular the premises were and are true, and so forth.

[Head or title as before.]

First, Whereas in the first article of the summary petition given in and admitted in this suit on the part and behalf of the said C. D. it is among other things alleged and pleaded, to wit, [here follows the statement, then the answer thereto, shewing same to be false, &c. &c. stating the owner's case at length, and pledging proof.]

Second, Here state the ownership of the ship, and any other matter, as the case for the owner.

Third, That all and singular the premises were and are true, and so forth.

The warrant in this case is the same in every respect as the preceding warrant to arrest a ship for wages, save in the following words:—"to answer unto A. B. the owner of, &c. [naming the salvor's ship] in a cause of salvage, &c.

This warrant is in substance the same as a warrant for wages or salvage, excepting that the proceeding is against the person of the master to arrest him.

(g) 3 Bla. Com. 68, 69, 108.

(h) See a valuable note, *The Ruckers*, 4 Rob. 74, n. (a). (i) *Ante*, 514, 515.

4. Allegation on behalf of an owner in a cause of subtraction of wages, shewing mutinous or bad behaviour of complainant amounting to desertion.

5. Allegation on behalf of an owner in a cause of subtraction of wages.

6. Warrant to arrest ship for salvage.

7. Warrant to arrest master of a ship for a sea battery.

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the suit may be either at law or in the Admiralty Court. (k) It is supposed to have been observed in the same case, that the most summary proceeding, called an "*act on petition*," is a convenient form of proceeding in matters of *slight* interest, but not adapted to *important* cases; (l) and not unfrequently the Court of Admiralty allows a summary form of proceeding, as by such an *act on petition*, and in which the parties state their respective cases briefly, and support their statements by affidavit: (m) thus this form is adopted in a proceeding to enforce payment of a bottomry bond.

In a suit for salvage or wages, it is advisable to make an *adequate tender* in the first stage of proceeding in a regular form, viz. by *act in court*, offering not only the due remuneration, but also expenses up to the time; in which case, but not otherwise, if the tender turn out to have been sufficient, the defendant may be relieved from the subsequent costs. (n)

The Admiralty or Instance Court is so distinct in jurisdiction from the Prize Court, that if an affidavit in a *civil* suit be sworn before a prize commissioner it is irregular. (o) In cases of collision as well as others, the Court will, preparatory to a final decree of sale, sign a "*primum decretum*," on an affidavit that the ship is in a perishable condition. (o)

The *first process* in this Court is frequently by *arrest* of the defendant's *person*, as in the instance of a sea battery we have just noticed, (and this although at law and under the statute 12 G. 1, c. 29, a person cannot be arrested without an affidavit of the cause of action,) (p) and upon which the defendant must find bail, (q) or fidejussors in the nature of bail; (r) and in case of default, the bail and principal may be imprisoned. (s) The Court may also fine and imprison for a contempt in the face of the Court, (t) and yet this is not a Court of Record. (u)

In the Admiralty it is an ancient established formula to initiate or commence a suit there by *arrest of ship*, tackle, apparel, and furniture, and leading to a full remedy, affecting all the property of every kind belonging to the owner. (x)

(k) *Christiana*, 2 Dod. Ad. R. 183.(l) *Ville de l'arsoire*, 2 Dod. Ad. R. 184.(m) Per Lord Stowell in the *Ville de l'arsoire*, 2 Dod. Ad. R. 184; 1 Hagg. Ad. R. 1. n.; *The Vrouw Margareta*, 4 Rob. 106.(n) *The Vrouw Margareta*, 4 Rob. R. 106, 107.(o) *Sylvan*, 2 Hagg. Ad. R. 155.(p) Clerk's Prac. Cur. Ad. p. 13; 3 Bla. Com. 108; *The Ruckers*, 4 Rob.

73.

(q) *The Ruckers*, 4 Rob. 73.

(r) Clerk's Prac. Cur. Ad. 11; 1 Rol. Ab. 531; Raym. 78; 2 Ld. Raym. 1216; 3 Bla. Com. 108, 109.

(s) 1 Rol. Ab. 531; Godb. 193, 260; 3 Bla. Com. 109.

(t) 1 Vent. 1; 1 Keb. 352; 3 Bla. Com. 109.

(u) Bro. Ab. Error, 177; 3 Bla. Com. 69, 109.

(x) *Dundee*, 1 Hagg. Ad. R. 124.

In order to obtain *restitution*, there must be *bail* for the value of the ship and intermediate earnings, and to return the vessel into the hands of the owners, if the Court should ultimately adjudge the possession to them. (y) Bail, at least those given in case of capture, remain liable, notwithstanding laches, and even after nine years' delay. (z)

In a case of alleged damage, committed by one ship to another, an action is *entered* and *warrant issued to arrest the ship*, and the proceeding is against the ship, her tackle, apparel and furniture; and the ship is released upon adequate bail to answer for the liability of the stores as well as the ship. (a) We have seen the effect of the bond executed by one part-owner to another conditioned for the safe return of the vessel. (b)

Sometimes a *monition* is the first proceeding, as a monition requiring an agent to bring in his account of the sale of a ship and cargo, and the balance of the proceeds undistributed, as in case of prize. (c) If a satisfactory return be not made to the monition, then the judge may *decree* him to be *attached*, but may afford time for submission, and order that the attachment be not enforced until a named time has elapsed; (c) after which, if the agent still remain in contempt, he may then be imprisoned. (c) But the Court refused (on the merits) an attachment against a part-owner, on the ground that he had not, as it was insisted, *substantially* complied with a decree of possession, and left the complaining part-owner to seek his further remedy elsewhere. (d)

With respect to *contempts*, the registrar of the Court reported, that the usual practice was *not* to arrest the guilty party in the *first instance*, although there was no doubt of the power; as in cases of wearing illegal colours, the first step was usually to grant a warrant to attach the person, founded on an affidavit of the fact. In a case where a ship had been taken possession of under the warrant of the Admiralty as derelict, and the cargo had been put into a warehouse by the agent of the Admiralty, and the warehouse had been broken open and the cargo taken out and sold, the Court, after precedents had been consulted, decreed a monition to *shew cause* why an attachment should not issue for contempt, and refused

(y) *Partridge*, 1 Hagg. Ad. R. 82.

(z) *The Vreede*, 1 Dod. Ad. R. 1.

(a) *Dundee*, 1 Hagg. Ad. R. 110, 125.

(b) *Ante*, 517 to 519; and 1 Hagg.

Ad. R. 312, 313; 2 *id.* 275, 280.

(c) *Harreguard*, 1 Hagg. Ad. R. 23, and notes.

(d) *John of London*, 1 Hagg. Ad. R. 342.

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the application for an *immediate* attachment and production of account of sale. (e)

There is an *express rule* of the Court of Admiralty of 5th August, 1806, that in every case where *bail* is required to be given in any cause depending in this Court, a *notice in writing* of the persons proposed to become bound shall be delivered at the office of the adverse proctor, and that no *bail-bond* or recognizance shall be taken, unless the adverse proctor, or some other proctor for him, be there present, or an affidavit be exhibited to prove that he has had such notice for the space of twenty-four hours, and been required to attend at the time of giving such bail, for the purpose of objecting or consenting thereto. (f) It should seem that the Court of Admiralty as well as the Prize Court, has jurisdiction *to rehear and revise its own decrees*, but will very reluctantly permit such a proceeding. (g)

SECT. XII.—Of the Prize Court.

SECT. XII.
Of the Prize
Court.

Sometimes the *Prize Court* has been described as if it were merely a branch of the Court of Admiralty; (h) but although the same judge usually presides in each, yet his authority to hear and decide *prize* causes entirely depends upon a *special* and *separate commission* under the great seal, issued at the commencement of each war, and the whole system of litigation and jurisprudence in the Prize Court, though exceedingly important, is peculiar to itself and is governed by rules not applying to the Instance Court of the Admiralty, which is a mere *civil* tribunal. (i) We have seen that in general injuries against the rights and *law of nations*, or committed under pretence of *capture* or *prize*, are never cognizable in a *municipal* Court, but only by the King, or some Court or persons *particularly* commissioned by him to take cognizance of such injuries, as in this instance of our Prize Court holden under a particular commission, and with which the temporal Courts cannot interfere by *prohibition*; (k) and there is no proper *international* Court; and no *action* can in general be sustained in a municipal Court

(e) 1 Rob. 331.

(f) 5 Rob. R. 406.

(g) *The Vrouw Hermina*, 1 Rob. 163.

(h) 3 Bla. C. 70.

(i) *Le Caux v. Eden*, Dougl. 594, 614;*ante*, vol. i. 2, note (b), 16 and 818; and see Palmer's Prac. House of Lords, 370, n.(k) 1 Madd. Ch. Pr. 15; *The Harmony*, 2 Dods. Ad. R. 78, 377.

for a *hostile capture or seizure* under colour of *prize* at sea or in foreign parts, (*l*) though a *mere piratical* or illegal seizure under pretence of *war* is, we have seen, remediable in the ordinary Court of Admiralty; (*m*) when the taking was *as prize* the proceeding for redress must be in the *Prize Court* under the existing special commission; (*n*) nor can any action for false imprisonment or detention of goods or ship be sustained. (*o*) This jurisdiction however does not take away that of the Court of Chancery, where a person, in whose favour an adjudication has been made, is a *trustee* for other parties, in which case he may be compelled in a Court of Equity to perform such *trust*. (*p*)

We have seen that where the property is in value under 100*l*. the Prize Court will determine upon the right on a summary proceeding. (*q*) No prohibition to the Prize Court of Admiralty will be granted for proceeding to adjudication on a ship taken as a prize, either during war, or even after the cessation of hostilities, for the Court has jurisdiction to complete what has been regularly commenced. (*r*)

In this Court of Prize are directly decided not only all questions relative to captures, but prize and sometimes *booty* (*s*) (or prize on shore), but also most other questions upon the law of nations, though sometimes the latter, and even the construction of *treaties*, are collaterally argued and determined in other Courts. The jurisdiction of the Prize Court is not like that of the Instance Court confined to transactions on the sea, but extends as well to hostile seizures on shore. (*t*) It has been justly observed that the powerful judgments to be found in Sir Christopher Robinson's Reports, commencing A. D. 1798, and the other subsequent reports, are models of judicial intelligence, impartiality, and eloquence, inducing all foreigners to admit that the English modes of administering of justice in the Court of Admiralty and of Prize are beyond comparison superior to those of any other foreign tribunal. (*u*) But as we are now in a state of *peace* it would be of little utility to add further observations on the jurisdiction and practice of the Court of *Prize*, however important its jurisdiction in time of war.

(*l*) *Elphinstone v. Bedreechemed*, Knapp, Rep. 516 to 361; *Hill v. Reardon*, 2 Sim. & Stu. 431; 2 Russ. R. 606.

(*m*) *Ante*, 538, n. (*i*).

(*n*) *Id.*

(*o*) *Id. ibid.*; *Faith v. Pearson*, Holt's Chan. Pr. 69, 70, note 14; *Duckworth v. Turner*, 2 Taunt. 7; *Bolton v. Gladstone*, 2 Taunt. 85.

(*p*) *Hill v. Reardon*, 2 Russ. R. 608.

(*q*) *The Mercurius*, 5 Rob. 127; *ante*, vol. i. 818.

(*r*) 1 Madd. 15; *The Harmony*, 2 Dods. Ad. R. 73, 377.

(*s*) 1 Hagg. 40.

(*t*) Sir W. Scott in *The Two Friends*, 1 Rob. Ad. R. 283.

(*u*) See Lord Grenville's Speech on the Russian Convention of 1801, p. 28 a. and 1 Hagg. Ad. R. 235, note.

CHAP. V.
SECT. XIII.SECT. XIII.—*Of the Court of Bankruptcy and its Subdivisions, as each Commissioner's Court, and the two Subdivision Courts; Court of Review; and Appeals to the Lord Chancellor or to House of Lords.*

1. The existing Law and what alteration introduced by 1 & 2 W. 4, c. 56.
2. Abstract of Stat. 1 & 2 W. 4, c. 56, with Notes.
3. Abstract of Stat. 2 & 3 W. 4, c. 114.
4. Abstract of the General Rules and Orders of the Court of Review.

1. Those of 12th January, 1839.
2. Of 2d & 3d February.
3. Of 15th February.
4. Of 19th March, &c. &c.
5. General Observations and Present Course of Proceeding.

General observations,

The last of the Courts, having as well *original* as appellate jurisdiction, to be here noticed, is “*The Court of Bankruptcy*,” and in which, especially under the recent act for the *administration* of the bankrupt law, viz. 1 & 2 W. 4, c. 56, the existence of *debts* and *claims* upon a bankrupt and rights to his property may be investigated and decided, and when *facts* are disputed may be tried by a *jury*, and there are a succession of *appeals* or *re-investigations of facts* as well as of *matters of law*; as from a single commissioner to one of the two Subdivision Courts, and from thence to the Court of Review, and from thence to the Lord Chancellor, and from his decision even to the highest tribunal—the House of Lords. The jurisdiction of the Courts we have previously considered are principally confined to litigation between two or more *solvent* individuals; but the Courts of Bankruptcy have jurisdiction only in cases where a trader or person subject to the bankrupt laws is not only supposed to be in a state of *general insolvency*, but has also *committed an act of bankruptcy*, and who is therefore considered to be no longer capable of performing his pecuniary engagements, and that therefore it is fit that, as far as practicable, an equal distribution of his effects amongst all his creditors should be secured by vesting the property in some third person or persons, to be administered under some public and uniform authority.

The substance of the former Bankrupt law continues, and only the practice has been materially altered, and that only as regards the Court and officers,

A system of bankrupt law administered under a *commission of bankruptcy* had long been established, and was consolidated by 6 G. 4, c. 16, and upon *that statute* still stands the *substance of the law of bankruptcy* as it relates to the *person* who may become a bankrupt, the *act of bankruptcy*, the *debt* of the *petitioning creditor*, who may cause a commission, now termed a *fiat*, to be issued, the *debts* that may be proved so as to receive dividends, the doctrine of *relation* to the act of bankruptcy, the law of *reputed ownership*, and respecting actions by and against assignees, and the *dividend* and the *certificate*. The laws respecting

those subjects *have not been materially altered*, so that the treatises of the Honourable Mr. Eden (now Lord Henley (x)), of Montague and Gregg, (y) and of Mr. Deacon, (z) and some minor works, and the author's summary, (a) respecting *those* subjects are *still in a great degree applicable*. But as regards the *Courts* and the official persons by whom the bankrupt law is to be *administered*, as well as the *practice*, the recent acts, 1 & 2 W. 4, c. 56, and 2 & 3 W. 4, c. 111, coupled with the rules and orders founded thereon, (b) have almost entirely *changed the jurisdiction* as well as the *practice* upon this important subject. (c)

Formal commission annulled.

Before the 1 & 2 W. 4, c. 56, it was necessary to issue a *verbose commission* addressed to several *commissioners* by names, and of whom as respected the metropolis there were *seventy*, and three of whom presided on *every occasion*, and received *fees* for each meeting however short or trifling the occasion. (d) *Assignees also*, not practically acquainted with the duties of their office, were chosen by the creditors, and had the entire possession of and control over the estate, and being generally in trade themselves very often failed with large sums belonging to the estate in hand, which were entirely lost to the creditors.

Outline of former jurisdiction and practice, and of the present ameliorated jurisdiction.

But *now*, in lieu of *such commission*, the Chancellor, Master of the Rolls, or Vice-Chancellor, or the Masters of the Court of Chancery, acting under an appointment by the Chancellor, on an *affidavit* and *bond* and petition, similar in substance to those previously required, may, in case the bankrupt resides in or within forty miles of London, issue his concise *fiat* under his hand in lieu of such commission, and thereby authorize such creditor to prosecute his complaint *in the Court of Bankruptcy*, (i. e. before one of the six appointed commissioners, and with

The issuing of a London fiat.

(x) Eden's Digest Bankrupt Law, 3 ed. A.D. 1832, per tot.

(y) Montague & Gregg's Bkpt. Law.

(z) Deacon's Bankrupt Law.

(a) See a compact Summary, Chitt. on Bills, 8th ed. 628 to 673, which was framed purposely to give a concise practical view of the Bankrupt Law for the use of students.

(b) Rules and Orders, 12 Jan. 1832; additional Rules of same date, and Rules 2 Feb., 15 Feb., 19 March, 27 March, and 28 March, 1831, stated in 1 Deacon & Chitty's Rep. XXIII. to XXXII; and see post, 551 to 555.

(c) The student will find a clear exposition of the stat. 1 & 2 W. 4, c. 56, and the first Rules and Orders, in Mr. Stewart's Practice in Bankruptcy. The

subsequent Rules and Orders, with the decisions thereon, will be found in Chitty & Deacon's Rep.; and see Montague & Bligh's Rep.

(d) It frequently occurred that merely for the purpose of examining a bankrupt or a third person respecting some matter of fact of but small importance, a private meeting of three commissioners was convened, and fees paid to each commissioner, and if the time of attendance exceeded two hours it was considered unreasonable, and the meeting was adjourned, although the commissioners were perhaps merely reading a newspaper all the time, excepting at the moment of signing their names; and thus this useless tribunal was as expensive as it was vicious. See also Eden's Bkpt. L. 79.

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The issuing of
a country fiat.

the power of appeal, &c.) (e) and which *fiat* is directed to be *filed* in that Court, and thereupon any one or more of the six commissioners is authorized to act in execution of the act, (f) and he is selected by ballot under the 11th and 12th Rules or Orders of 12th January, 1832, made in virtue of that act. (g)

To provide for a *country* bankruptcy, (that is, where the bankrupt resides out of London, or more than forty miles therefrom,) the judges on their circuits are to return to the Chancellor the names of barristers, solicitors, and attornies resident in country districts, and if he approve, they are placed on a list of country commissioners, and then *fiats* for *country* proceedings in bankruptcy are not to be directed to the *Court of Bankruptcy*, or prosecuted before one of the six commissioners, but are directed to some *one or more* of *such* persons in *rotation*, who are to be particularly named in the fiat, and are thereupon to act as such commissioners within their districts.

The Lord Chancellor *alone* has jurisdiction under the 19th section by his order to *annul* a *fiat*, and such order is to have the effect of the former proceeding by writ of supersedeas.

An analysis of
1 & 2 W. 4, c.
56, altering the
jurisdiction and
powers of the
Court of Bank-
ruptcy and its
subdivisions.

The four judges
of the Court of
Review.

The six com-
missioners.

An outline of the statute 1 & 2 W. 4, c. 56, (which commenced in operation from and after the 11th January, 1832,) may here be useful. The 1st section constitutes by name the *entire* Court or jurisdiction, "the Court of Bankruptcy," and enacts that *four* persons of prescribed standing at the bar shall be the *judges* of such Court; and *six* persons, being barristers of not less than seven years' standing, or of four years' standing at the bar, who have practised as a special pleader for three years below the bar, *commissioners* of such Court; (h) and then

(e) 1 & 2 W. 4, c. 56, sect. 12.

(f) *Ibid.* sect. 13.

(g) Upon the granting every fiat, whether in a town or country bankruptcy, 10*l.* is to be paid to the Chancellor's Secretary of Bankrupts, and all which sums are once a week to be paid into the Bank of England, see 1 & 2 W. 4, c. 56, sect. 45; and every official assignee is out of the first monies that come to his hands, and immediately after the choice of assignees by the commissioners, to pay 20*l.* to the accountant-general; see sect. 40.

It will be observed, that the *London* commissioners and other officers are remunerated by a fixed salary; *country* commissioners are entitled to 20*s.* for every meeting, with a like fee for the execution of every deed, (of which however there are but few since 1 & 2 W. 4, c. 56, sects. 25, 26 and 27,) and for every certificate, 6 G. 4, c. 16, sect. 22; and a further

allowance of 20*s.* to commissioners being barristers, and for travelling seven miles or upwards to the place of meeting, an additional fee of 20*s.* But no charges for eating or drinking can be legally made, *Ex parte Halliday*, 7 Vin. Abr. 77; *Ex parte Harbin*, 1 Rose, 59; *Ex parte Griffiths*, 2 Rose, 342; 1 Madd. R. 56; *Ex parte Butler*, 1 Mont. Dig. 638; Eden's (Id. Henley's) Bkpt. L. 3d. edit. 81.

(h) Under this act the Hon. Thomas Erskine, K. C. was appointed the Chief Justice, and Sir A. Pell, Sir J. Cross, and Sir G. Rose were appointed the puisne judges.

The vacancy occasioned by the death of Sir A. Pell has not been filled up, so that now there are only *three* judges of the Court of Review. And the Privy Council Act, 3 & 4 W. 4, c. 41, sect. 26, enables *two* of the judges of the Court of Review to form the Court when the Chief

declares that the same Court shall be and constitute a *Court of Law* as well as *Equity*, (*h*) and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a *Court of Record* or *judge of a Court of Record* the same as the judges of the Courts at Westminster. (*i*)

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Constituted a Court of Law and Equity and of Record.

The *second* section enacts that such four judges, or any *three of them*, shall form a *Court of Review*, which shall always sit in public, (excepting when otherwise directed by *that act*, or by the rules to be made in pursuance thereof,) and shall have *superintendence* and *control* in all matters of bankruptcy as theretofore exercised upon petition to the Chancellor. And the 3 & 4 W. 4, c. 41, sect. 1 and 26, constituting the Chief Justice of the Court of Review one of the judges of the Judicial Committee of the Privy Council, enables any *two* of the judges of the Court of Review to hold and constitute the Court during the absence of the Chief Justice when attending such Judicial Committee.

SECT. 2. The Court of Review to have the same jurisdiction as the Chancellor previously had on petition.

The *third* section enacts that the matters to be heard and determined in such Court of Review shall be brought on by way of *petition*, *motion*, or *special case*, according to the *rules and regulations to be established* as hereinafter provided; and the decision of such Court of Review is to be *final* and subject only to an *appeal* to the Lord Chancellor on *matters of law and equity*, or on the *refusal or admission of evidence only*. And such limited matters of appeal to the Chancellor are to be only on a *special case*, and such case shall be approved and *certified* by one of the judges of the Court of Review, in matters arising in that Court, and by the judge trying the issue, in matters arising out of the trial of issues; and the determination of such judge, on the settlement of such case, shall be final and conclusive. The appeal to the Chancellor under this act is to be heard *only* by the Chancellor, and *not* by any other judge of the High Court of Chancery; which enactment, it has been observed, impliedly abrogates the jurisdiction of the Vice-Chancellor to interfere, excepting only in issuing his *fiat*, (under sect. 12,) so as merely to *initiate* proceedings against a bankrupt. (*k*)

SECT. 3. Course of proceeding in Court of Review to be on petition, motion, or special case. Decision of Court of Review to be final, except on appeal by special case to be heard and determined by Chancellor only.

Justice is absent therefrom by reason of his attendance at the Judicial Committee of the Privy Council.

(*h*) Even before this act commissioners of bankrupt were considered as having equitable as well as legal jurisdiction, *Bromley v. Goodere*, 1 Atk. 77; and as to

discretionary power, &c. *Ex parte King*, 11 East, 92; 11 Ves. 417; 13 *ibid.* 181; 15 *ibid.* 126; Stewart's *Prac. Bankruptcy*, 11, note (a).

(*i*) 1 & 2 W. 4, c. 56, sect. 1.

(*k*) Eden's *Bkpt. L.* 3 edit. 457, and ante, 449.

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Sect. 4. Court of Review may direct an *issue* in fact to be tried before one of its own judges or by a judge on circuit.

Sect. 5. Costs in discretion of Court.

Sect. 6. The six commissioners to form two Subdivision Courts of three commissioners each.

Sect. 7. Any one commissioner may execute powers of act, except that one can only commit for safe custody.

Sects. 8, 9. Official oaths of judges, &c.; appointment of two registrars.

Sect. 10. Attornies and solicitors may be admitted, and how far practise. (m)

The *fourth* section authorizes the Court of Review to direct any *issue of fact* arising therein to be tried by a jury before one of the judges thereof, or before a judge of assize, and gives necessary powers to compel the attendance of jurors and witnesses, and to enforce the orders and decrees of the Court of Review.

The *fifth* section declares that all *costs* of suit between party and party in the said Court of Review shall be in the discretion of the Court, and shall be taxed by one of the masters of the Court of Chancery.

The *sixth* section enacts that the six commissioners may be formed into two *Subdivision Courts*, consisting of three commissioners for each Court, for hearing and determining the matters and things, and making the examination referred to each Subdivision Court by sect. 30; and that all references or adjournments by a single commissioner to a Subdivision Court shall be to the Subdivision Court in which such single commissioner belongs, unless in case of sickness. The 36th rule or order of 12th January, A. D. 1832, directed that the *first* Subdivision Court should consist of C. F. Williams, J. Evans, and R. G. C. Fane, esquires; and the *second* Subdivision Court should consist of J. H. Merivale, S. M. Fonblanque, and E. Holroyd, esquires.

The *seventh* section enacts that *any one* of the six commissioners may execute all the powers, duties, and authorities given by any bankrupt act the same as if he had been specially named in a commission, with the exception that *one* commissioner can *only* commit for *safe custody*; and the party must within three days following be brought up before the Subdivision Court or the Court of Review.

The eighth section prescribes the *oath* to be taken by each judge and commissioner; the ninth section authorizes the appointment of two *registrars* and eight deputy registrars. (l)

The tenth section entitles all attornies and solicitors of either of the superior Courts at Westminster to be admitted and have their names enrolled in the Court of Bankruptcy without any fee, other than allowed by that act, viz. 5s., (m) and they may

(l) The chief judge has a salary of 3000*l.* per annum, the puisne 2000*l.* each. Each commissioner 1500*l.*; each chief registrar 800*l.* per annum; and each deputy registrar 600*l.* The whole expense of the establishment is now 36,400*l.*, though formerly it was about 70,000*l.*

(m) Deacon and Chitty's Reports, 5.

It is not necessary that a person suing out a *fiat* should be a solicitor in chancery; an attorney of a common law court may obtain and prosecute a *fiat*, *Wilkinson v. Digges*, 1 B. & Cres. 158; *Ford v. Webb*, 3 Br. & B. 241. If guilty of fraud, collusion or misconduct, or gross ignorance or negligence, the Lord Chancellor for-

afterwards appear and plead in any proceedings in that Court without being required to employ counsel (*except in proceedings before the Court of Review, and upon the trial of issues by jury*). But any other person not admitted, who shall practise, incurs a contempt and penalties; and attornies admitted are liable to the like consequence as attornies and solicitors practising in the superior Courts.

The 11th section enacts, "that the judges of the Court of Review, with the consent of the Chancellor, may make *general rules and orders* for regulating the *practice* of the said Court of Bankruptcy, the sitting of the judges and commissioners thereof, and the conduct of the other officers and of the practitioners therein." Accordingly, on the 12th January, 1832, *thirty-six* such rules and orders were made and promulgated, and intended to regulate all *subsequent* proceedings; and some rules were at the same time made relating to preceding commissions, and a form of petition to the Court of Review was prescribed; (n) and subsequently other general rules and orders have been also made under this power.

The *Court of Bankruptcy* having been thus constituted of each Commissioner's Court, the two Subdivision Courts, and the Court of Review, (with an appeal to the Lord Chancellor and an appeal also from him in certain cases to the House of Lords), (o) the statute then proceeds to enact, (in sect. 12,) "that in lieu of the former commission, the Lord Chancellor, the Master of the Rolls, the Vice-Chancellor, and each of the Masters in Chancery, acting under any appointment by the

S. 11. Power of Court of Review to make general rules and orders.

S. 12. The Chancellor, Master of the Rolls, and Vice-Chancellor, &c. when and how to issue his fiat in bankruptcy.

merly might on petition order him to pay costs occasioned, 14 Ves. 209; 13 Ves. 62—67; Buck, 24, 27; and for gross misconduct he might have been removed, 1 Gl. & J. 78. The Court will only exercise a *summary jurisdiction* over an attorney when he acted in the character of an officer of the Court and not in an ordinary case between attorney and client; *Ex parte Bull*, 3 Dea. & Chit. 116; and see *Ex parte Hicks*, 2 *ibid.* 573; where the Court will interfere summarily, *Ex parte Williams*, 3 Dea. & Chit. 103.

Tuesday, June 24, 1834, *In re Robert Marks, alias Marsh*.—Mr. Montagu applied at the instance of the Incorporated Law Society, that Robert Marks, *alias Marsh*, should be struck off the roll of practitioners belonging to this Court, a similar application having been already complied with in the Court of Exchequer.

The Court said, that as the party in question had not been served with a notice of the application, it would not pro-

ceed at once to this extremity.

Rule *nisi* granted.

Afterwards, on 4th July, 1834, in the Court of Review, in the same matter of Marks, Mr. Montagu presented a petition praying the Court to admit substituted service of an order upon the defendant, it being sworn that he was not to be found at home, and it was thought that he had left the country. The order had reference to proceedings instituted against the defendant, an attorney, for striking him off the roll, as he had been already from some other Courts.

The Court granted the prayer of the petition.

(n) The following is the prescribed form of petition:

In the matter of C. D. a Bankrupt.
To the Right Honourable the Chief Judge and the other Judges of the Court of Review. The humble petition of, &c. Sheweth that, &c.

(o) Sect. 37.

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Chancellor to be given for that purpose, on *petition* made to the Chancellor against any *trader* having committed any *act of bankruptcy* by any creditor of such trader, and upon his *filing* such *affidavit* and giving *such bond as is by law required*, (p) to issue his *fiat* under *his* hand, thereby authorizing such creditor to prosecute his said complaint in the said Court of Bankruptcy, (q) or to prosecute the same *elsewhere* (r) before such discreet and proper persons as the Chancellor, &c. by such fiat, may think fit to nominate and appoint, and which persons so appointed are to have the same powers as if they had been specially assigned by a commission.

S. 13. One commissioner to act thereon when appointed by ballot on a town fiat, and how to be balloted for.

The 13th section enacts, "that every such fiat prosecuted in the said Court of Bankruptcy (meaning a London bankruptcy) shall be filed and entered of record in the said Court, and thereupon any one or more of the six commissioners may proceed thereon." But the fiat as well as the act are silent as to the *particular* London commissioners; and therefore the 11th of the General Rules and Orders of the 12th January, 1832, directs that upon every application for an appointment *for opening a fiat*, the registrar shall, in the presence of the solicitor applying for the same, *allot such fiat by ballot to one of the commissioners of the Court*, according to the regulation to be from time to time prescribed by the Court of Review, except in cases of second or renewed fiats, which shall go to the *same commissioners* before whom the former commission or fiat was prosecuted; and the 12th order directs, that the registrar shall, in the presence of such attorney or solicitor, *write upon the face of the fiat, the name of the commissioner* before whom the same is to be opened; and thus *by ballot* all partiality or preference in the choice of the London commissioner is imperatively avoided.

S. 15 and 16. Commissioners' oath and proceedings to adjudge the party a bankrupt.

The 15th section prescribes the oath of the commissioners; and the 16th section enacts, that the provisions of the former acts relating to bankrupts and to commissioners of bankruptcy, &c. shall be applicable except as particularly varied. The *single* commissioner on a town fiat, therefore, instead of the *several* commissioners named in the commission as theretofore, is to proceed precisely according to the former practice, viz. *ex parte*, and when the petitioning creditor's debt, trading, and act of bankruptcy have been proved before him to his satisfac-

(p) Obviously referring to the previously existing law then in force under 6 G. 4, c. 16.

(q) i. e. meaning in the Court in London.

(r) Meaning in the country.

tion, he is to proceed to *adjudge the party bankrupt.* (s) On a country fiat the commissioners (who have not, like the London fixed commissioners, taken a general oath of office,) must first qualify themselves by taking the oath directed by the 15th section; (t) after which they are to receive the evidence of the petitioning creditor's debt, and of the trading and act of bankruptcy, and proceed to adjudge the party a bankrupt as heretofore.

The 17th section prescribes the *time and manner* of proceeding in case the *bankrupt disputes the adjudication*, and enacts, that in that case he shall present a *petition*, praying the reversal of such adjudication, to the Court of Review within two calendar months from the date of the adjudication, if such trader (u) shall be then residing within the United Kingdom; or within three calendar months, if residing elsewhere in Europe; or within a year, if residing elsewhere; or within such other time as the Court shall allow, not exceeding one year; and such Court of Review shall proceed to hear and decide upon such petition; or there may be an issue and trial by a jury, and an appeal to the Chancellor upon matter of law or equity, or admissibility of evidence. (x) Under sect. 18 the Chancellor may issue another fiat at the instance of another creditor.

S. 17 and 18.
Proceedings when bankrupt disputes his bankruptcy or adjudication.

The 22d section relates to *official assignees*, and in great amelioration of the former practice in bankruptcy (which vested the estate of the bankrupt wholly in persons chosen by the creditors, and who perhaps had never before acted in such a character, and not unfrequently misapplied the bankrupt's estate, (y)) now enacts, that a number of persons, not exceeding *thirty*, being merchants, brokers, or accountants, who were or had been engaged in trade in London or Westminster, should be chosen by the Chancellor to *act as official assignees* in all bankruptcies prosecuted in the said Court of bankruptcy, (that is, under a London fiat,) and *one* of whom should in all cases be an assignee of each bankrupt's estate, *together with the assignee or assignees chosen by the creditors*; such *official assignee* to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner, as the judges of the Court of Review, with the consent of the Lord Chancellor, should direct; and such *official assignee alone* is to possess and receive rents, and all estates real and personal of

S. 22. Appointment of an official assignee, in whom property vested.

(s) Eden's Bankrupt Law, 3d ed. 72, 73.

(t) *Ibid.* p. 72.

(u) *Sic* in statute, *sed quare* if it should not have been *party*, as one ground

of disputing in adjudication may be that there was no trading.

(x) Eden's Bankrupt Law, 3d ed. 73, 74.

(y) *Ibid.* 207, a.

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the bankrupt, (save only when others were directed by the said Court of Bankruptcy, or a judge or a commissioner thereof,) and all stock in the public funds, and monies and negotiable securities, are to be forthwith transferred, delivered, and paid by such official assignee into the *Bank of England*, to the credit of the accountant-general of the Court of Chancery, or he incurs a penalty.

The 23d section, however, provides that the official assignee shall not interfere with the credit of assignee in the appointment or removal of a solicitor or attorney, or in the sale of the bankrupt's estate.

Official assignee, how balloted for by rotation on a town fiat.

The 17th and 18th Rules of 12th January, 1832, direct that the official assignees shall be divided equally among the six commissioners, and that each commissioner shall appoint his appropriated assignees to *act in rotation* under the several bankruptcies prosecuted before him, such rotation to be settled by ballot, except in special cases to be referred by the commissioners adjudicating them to the other commissioners of his Subdivision Court, or the Court of Review.

The 25th, 26th, and 27th sections vest the property in the assignee or assignees for the time being, without the useless necessity for any deed or conveyance, as theretofore required.

S. 25, 26, 27. Necessity for instruments of assignment or conveyance to assignees abrogated. (z)

S. 34. Proof of debts by affidavit and proceedings thereon if disputed and trial by jury.

The 34th section relates to the *proof of debts*, and introduces a convenient alteration in the proceeding, which formerly required each creditor to attend *in person* before the commissioners and sign in their presence a written deposition upon oath of his debt. (a) This section authorizes any creditor to make *proof of his debt by affidavit*, sworn before one of the judges of the Court of Review, or a commissioner, or a master in chancery, ordinary or extraordinary; or if such creditor reside out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister or consul; subject, nevertheless, to such rules and orders touching the *personal attendance* of any creditor to make such proof according to the then existing laws and practice in bankruptcy, as the Court of Review, with the consent of the Chancellor, shall make and direct. (b) Section 30 authorizes

(z) See Eden's Bankrupt Law, 223 to 258.

(a) 6 G. 4, c. 16, s. 46; *Ex parte Woolley*, 1 Gl. & J. 395; *Ex parte Symes*, 11 Ves. 521, and see now Eden's Bkpt. L. 3d edit. 100.

(b) This was to continue the power of examining the creditor proving as to the

consideration of the debt, it not being compulsory to receive the proof, 1 Atk. 71, 222; especially when the merits of the debt may be questionable, see *Ex parte Butterfill*, 1 Rose, 192; 1 Ves. & B. 214; *Ex parte Kemshead*, 1 Rose, 149; *Ex parte Symes*, 11 Ves. 521; Eden's Bkpt. L. 3d edit. 101.

the commissioners to adjourn the examination of a proof of a debt to be heard before a Subdivision Court, so as to have the assistance of two other commissioners, and which latter Court is to proceed with such last mentioned examination, and finally, without any appeal (except upon matter of law or equity or the refusal or admission of evidence,) shall determine upon such proof of debts; but it is provided, that in case, before the single commissioner or the Subdivision Court, *both parties*, the assignees or the major part of them and the creditor, *consent* to have the validity of any debt in dispute tried by a *jury*, an *issue* shall be prepared under the direction of the commissioners or Subdivision Court, and sent for trial before the chief judge or one or more of the other judges; and *if one party only* applies for such issue the said commissioners or Subdivision Court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the Court of Review. (c) The 33d section enables the Court of Review to grant a *new trial*.

Trial by a jury of existence of a debt.

With respect to *appeals*, the 31st section enacts, that if a commissioner or one of the Subdivision Courts shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in *case of any disputed debt*, such matter may be brought under the review of the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of, and a sum not exceeding any expected dividend on the *debt in dispute* may be set apart in the hands of the accountant general until such decision be made, and in the like manner there may be an appeal on the like matter of law or equity from the Court of Review to the Lord Chancellor. The 32d section enacts, that if the Court of Review shall determine on any appeal touching any decision in matter of law upon the whole merits of any *proof of debt*, then the order of the said Court shall finally determine the question as to the said proof, unless an appeal to the Chancellor be lodged within one month from such determination; and in case of such an appeal, the determination of the Chancellor shall be final touching such proof; but if the appeal, either to the Court of Review or to the Chancellor, shall be allowed in relation to the admission or refusal of *evidence*, then the proof of the debt shall be again heard by the commissioner or Subdivision Court and the said evidence shall then be admitted or rejected accordingly. We have seen that the 3rd

S. 31 & 32. In what cases the decision of commissioners or Subdivision Court may be appealed from to the Court of Review and from thence to the Chancellor.

(c) The introduction by this act of the power of trying the existence of a disputed debt by a jury is *entirely new*.

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S. 37. Appeal
to the House of
Lords, when and
how it may be
prosecuted.

section prescribes the *manner* in which appeals from the Court of Review, viz. by *special case*, shall be brought before the Chancellor, and that the same must be determined by himself and not delegated to the Master of the Rolls or Vice-Chancellor. (d)

The 37th section relates to *appeals to the House of Lords* and enacts, that in case the Chancellor shall deem any matter of *law or equity*, brought before him by way of appeal from the Court of Review, to be of *sufficient difficulty* or importance to require the decision of the House of Lords, or in case *both parties* in any proceeding before the Court of Review shall desire that any such matter may be determined in the first instance by the House of Lords and not by the Chancellor, then the Chancellor or Court of Review may direct the whole facts whereupon such question shall arise to be stated in the form of a *petition of appeal* to the House of Lords, and the party appealing may carry such appeal to the House of Lords *in like manner* as other appeals are preferred to that House; and the section then contains directions respecting the *mode* of stating the facts in such petition.

Summary of
other enact-
ments in 1 & 2
W. 4, c. 56.

This act contains several minor regulations, as that a commissioner may appoint two or more instead of the three public meetings under the former act for the bankrupt to surrender and conform, and the last of which meetings is to be on the forty-second day after the publication of the bankruptcy in the Gazette, and that the choice of assignees shall take place at the first of such two meetings. (e) The judges and commissioners are also authorized to take the whole or any part of the evidence given before them either viva voce on oath or upon affidavit. (f) Section 42 enacts, that no commission or fiat shall be superseded or annulled, nor any adjudication reversed, by reason only that the same has been *concerted* by and between the petitioning creditor, his solicitor or agent, or any of them; and the bankrupt, his solicitor or agent, or any of them, except in cases then pending. (g) Section 38 authorizes the assignees, with the approbation of the proper Subdivision Court, to appoint the bankrupt himself to superintend the management of the estate, or carry on the trade for the creditors, and otherwise to act, and on such terms as they may think fit, which enactment is entirely new.

The 43d section enacts, that if the assignees *agree to refer* any matter in such manner as by law they were then already empowered to do, such agreement of reference may be made a

(d) Sect. 3, ante, 54S.

(e) Sect. 20.

(f) Sect. 38.

(g) It was formerly otherwise, 1 Rose, 37; 1 Buck, 77. 257; 1 Gl. & Jam. 17; Bul. N. P. 39.

rule of the Court of Bankruptcy. The 57th section authorizes each commissioner to order and allow such sum as he thinks reasonable to be paid to the official assignee as a remuneration for his services.

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On the 15th August, 1832, another act relating to bankruptcy was passed to amend the laws, viz. 2 & 3 W. 4, c. 114., providing for the custody of records under former commissions of bankrupt and to their enrolment. Section 5 enacts, that fiats shall be entered of record on application of any interested party, and without any written petition for the purpose; and section 6 prescribes the fees for entry of commissions and fiats; section 8 enacts, that no fiat shall be received in evidence unless first entered of record; and section 9 provides, that upon the *production* of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively and of the same having been so entered of record, without any further proof thereof. But perhaps *the most important* enactment is contained in the 7th section, viz., that the *deposition of a deceased witness* relative to a petitioning creditor's debt, trading, or act of bankruptcy, duly entered of record, shall be *admissible in evidence* and have the same effect as if the matters alleged therein had been deposed to by the same witness in such Court according to the ordinary course and practice thereof, subject, however, to the qualifications therein prescribed.

Substance of the
statute 2 & 3
W. 4, c. 114,
relating to
bankrupts.

We have already adverted occasionally to the General Rules and Orders of the Judges of the Court of Review, made and promulgated on the 12th of January, A. D. 1832, under the 11th section of 1 & 2 Wm. 4, c. 56, and several other subsequent Rules, which may be thus abstracted:—

The Rules and
Orders founded
on 1 & 2 W. 4,
c. 56, s. 11,
ante, 545.

Rule 1st. Prescribes that all affidavits shall be filed with the registrar.

The General
Rules and
Orders, 12 Jan.
A. D. 1832.

2d. That the registrar's office shall be at the Court of Commissioners of Bankrupts in Basinghall Street, London, and shall be kept open daily, except Sundays, from ten in the morning until four in the afternoon, and in the evening from seven to nine.

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3d. That attornies shall be admitted and enrolled in the Court of Bankruptcy by order of Court of Review.

4th. That such admission and enrolment shall be upon production of a certificate from the proper officer, and upon filing his own affidavit of his being such attorney or solicitor and of the date of his former admission, such affidavit to be sworn by him, if residing in London or within ten miles, before the Court of Review, and if residing elsewhere, before a Master in Ordinary or Extraordinary in Chancery. (*h*)

By Order 5 only the sum of 5*s.* and not 25*s.* are demandable. (*i*)

The 6th Rule requires every attorney and solicitor admitted in the Court of Bankruptcy to enter in the registrar's book, at his office, his name and place of abode, or some other proper place in London, Middlesex or Southwark, within one mile of that office, where he may be served with notices, summonses, orders and rules in matters depending in the said Court, and in case of neglect, then the fixing up of any notice or the copy of a summons, order or rule for such attorney or solicitor in the office of the chief registrar shall suffice.

Rule 9th. That all proceedings before the Commissioners in the Court of Bankruptcy shall be written on parchment or paper of *one uniform size*, and shall remain of record in the said Court.

Rules 10, 11 and 12, relate to the filing of fiats and allotting Commissioners by ballot as already shewn, and the registrar's writing the name of the elected commissioner on the fiat. (*k*)

Rule 13 requires the fiat to be prosecuted before the elected commissioner, unless otherwise specially ordered by the Court of Review or one of its judges.

Rule 14 requires the commissioners to sit daily (Sundays and holidays thereafter to be named only excepted) at ten o'clock, at the Court of Commissioners of Bankrupts in Basinghall Street, and shall hold their *Subdivision Courts* at the same place as occasion may require. (*l*)

Rule 15. That a deputy registrar shall attend upon each commissioner to take minutes, to draw up and have the charge

(*h*) As to who may be admitted, see ante, 544. If an attorney be unable from bodily infirmity to attend to be sworn in, he may be allowed to be admitted on an affidavit sworn before such master, *Ex parte Swain*, 1 Dea. & Chit. 15. And under special circumstances a person may be admitted as an attorney of this Court

nunc pro tunc, *Ex parte Tanner*, 3 Dea. & Chit. 10.

(*i*) 1 Dea. & Chit. Rep. 5.

(*k*) *Ante*, 546.

(*l*) It will be observed that the duration of the commissioners' stay at the office is not fixed. The registrars are, by rule 2, to continue at their office till four o'clock.

of all proceedings before him under the superintendence of the chief registrar.

Rule 16. In lieu of attaching a copy of the Gazette as theretofore, the deputy registrars are to make a memorandum of the appearance of the advertisement in the Gazette, and of the date thereof, with proper reference to the file to facilitate search.

The 17th and 18th Rules, we have seen, direct that the official assignees shall be divided equally amongst the six commissioners, and be chosen by ballot.

The 20th Rule directs that the appointment of any assignee to any bankrupt's estate shall be under the hand of the commissioner, and shall remain of record in the said Court of Bankruptcy; and certificates of such appointment, under the seal of the Court, shall be delivered to such assignee by the registrar on application for the same.

The 21st Rule prescribes that no official assignee shall, either directly or indirectly, carry on any trade or business, or hold or be engaged in any office or employment other than his said office and employment.

The 22d, 23d and 24th Rules require each official assignee to find sureties to the extent of 6000*l.* and execute to the two registrars a joint and several bond in the penal sum of 6000*l.* and enjoin certain notices and proceedings respecting the same.

The 25th Rule enjoins each official assignee to obey the instruction of his commissioner or of the Court of Review.

The 26th Rule orders each official assignee to pay into the Bank of England all monies as soon as they amount to 100*l.*, and to deliver an account therewith.

The 27th Rule *recommends* each commissioner to allow to the official assignees *one per cent.* on the monies they receive, and one and a half per cent. more on the monies actually divided, but subject to reduction by the Court of Review.

The 28th and 29th Rules direct that a messenger shall, upon taking possession, forthwith take an inventory of the bankrupt's effects, but that no appraisalment shall be made or other expenses incurred without the special direction of the commissioner, until after the appointment of the creditors' assignees, and a table of reduced messenger's fees is then *recommended*.

Rule 30 directs that all petitions presented to the Court of Review shall be entered in the registrar's office, and that the fiat directing the attendance thereon shall be under the seal of the Court of Bankruptcy, and that the original petition shall, when served, be returned to the registrar on or before the

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hearing and be filed of record, and that it shall not be necessary to recite such petition at length in any order pronounced by the Court thereon.

Rule 31. All the process of the Court of Review shall be under the seal of the Court of Bankruptcy. *

Rule 32. That all agreements of reference to be made rules of the Court of Bankruptcy shall be so made by order of the Court of Review, and all matters arising thereon shall be heard and determined by the Court of Review.

Rule 33. That all recognizances to be taken and acknowledged in the Court of Bankruptcy shall be taken and acknowledged before the Court of Review.

Rule 35. That the practice in the Court of Review shall, until otherwise ordered, be conformed as nearly as may be to the present practice in matters before the Chancellor.

Rule 36. That the *first Subdivision Court* shall consist of C. F. Williams, Joshua Evans and R. G. C. Fane, Esquires; and the *second Subdivision Court* shall consist of J. H. Merivale, S. M. Fonblanque and E. Holroyd, Esquires.

T. ERSKINE, C. J.

ALBERT PELL, J.

J. CROSS, J.

G. ROSE, J.

12 January, 1832, approved BROUGHAM, C.

General Order,
2 & 3 February,
1832.

It is ordered that each official assignee shall present for acceptance all unaccepted bills of exchange as soon as he shall receive the same and before he deposits them in the Bank of England as thereafter directed.

That each official assignee shall deposit in the Bank of England, to the credit of the accountant-general of the Court of Chancery, all bills, notes and other negotiable instruments, (except unaccepted bills), as soon as he shall receive the same, with a statement in writing, with the cashier of the bank, stating the date, contents, &c. and take a receipt for the same, to be produced, when required, to the commissioners, and the cashier is to duly present such securities for payment, and if paid pay the proceeds into the bank to the credit of such accountant-general. And in case such security be dishonoured, the cashier is to deliver the same to a notary to be duly noted and protested, and who is to return the same to the cashier to be again deposited in the bank.

Signed by the same Judges.

*Court of Review, 15 February, 1832.*CHAP V.
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It is further ordered that official assignees shall give due notice of dishonoured bills, notes and other negotiable securities.

General Order,
15 February,
1832.*Court of Review, 19 March, 1832.*

It is ordered, that in all matters referred by this Court to any judge or commissioner of the Court of Bankruptcy, he may in his report state such special circumstances as he shall think fit without being specially directed so to do.

General Order,
19 March, 1832.

When bankrupts holding short bills, the property of a customer, become a bankrupt, the customer may on petition to the Court of Review obtain an order for the accountant-general to deliver such bill to enable him to proceed thereon. His Honour the Chief Judge said that there ought to have been no difficulty in such a case, for there was a general order that upon the dishonour of any bill it should be restored to the official assignee. The prayer of the petition was granted. (m)

The Bankrupt Law at present stands thus. The 6 G. 4, c. 16, s. 1, describes the *persons* who may be made bankrupts. Sections 2 to 8 define the *acts of bankruptcy*. Section 13, the affidavit and bond to found a commission, which were precisely as now required. The rest of that act prescribed the *other* parts of the law of bankruptcy, most of which, as already observed, is still in force. The new act 1 & 2 W. 4, c. 56, s. 12, in addition to the Lord Chancellor, also authorizes the Master of the Rolls, the Vice-Chancellor, or a Master of the Court of Chancery (when so especially authorized by the Chancellor) to issue his *fiat* in lieu of the commission theretofore issued under 6 Geo. 4, c. 16, s. 12. But the most important alterations are in 1st, constituting each of the six appointed commissioners a separate and subordinate Court; and then, as a Court of Appeal, or to assist each commissioner, are, 2dly, two Subdivision Courts of three commissioners: 3dly, is the Court of Review, holden before a chief justice, (who is also one of the judges of the judicial committee of the privy council, under 3 & 4 W. 4, c. 41, s. 1,) and at present two other judges, to whom are delegated all the powers that, under the former system, were vested in the Lord Chancellor on a petition in bankruptcy from the decision of any of the former *seventy* commissioners or country commissioners, now abolished. This Court of Review is a Court of Appeal as well from the decision of each commissioner, as also from both the Subdivision Courts, and in case the proof

5. General observations on the effect of the recent acts and rules, and the present course of proceeding in obtaining a *fiat*, proving a debt, and the other proceedings thereupon.

(m) *Ex parte Ellis and others. In re Sir George Duckett and Co., Court of Review,* 16 April, 1831. Chitty on Bills, 8 edit. 805.

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The practical course of proceeding to obtain and prosecute a fiat.

of a debt is disputed, has power to summon a jury and try the existence of the debt, before one of the judges of the Court of Review or a judge on the circuit. It is also a Court of Law and Equity and of Appeal from the decision of such commissioner and Subdivision Courts, and upon the improper admission or rejection of evidence. And upon a special case, there is an appeal from the Court of Review to the Chancellor, and from his decision to the House of Lords.

The *course of proceeding*, when one creditor or several creditors in partnership can swear to the existence of a single debt of 100*l.*, or two separate creditors to debts of 150*l.*, or three or more creditors to debts in the aggregate of 200*l.* is,

First, To search the docket book at the Bankrupts' Office, situate in Basinghall Street, London, in order to ascertain whether a docket has been already struck, and if not, then,

Secondly, To prepare an *affidavit* of such debt or debts, and of the creditor's belief that his debtor is *become* bankrupt, which allegation imports two facts, viz., a trading, or that he is otherwise subject to the bankrupt laws, and that he has committed an act of bankruptcy. (*n*)

Thirdly, When the bankrupt resides in London, or within forty miles thereof, (*o*) this affidavit is to be *sworn* before a Master in Chancery; but if the creditor reside in the country, and beyond that distance, then before a Master Extraordinary in Chancery. (*p*)

Fourthly, The creditor is then, in pursuance of 6 G. 4, c. 16, s. 13, to execute the usual *bond*, in the penalty of 200*l.*, conditioned to prove his debt and that an act of bankruptcy is committed by the debtor before the fiat was issued. (*q*) Such

Form of petitioning creditor's affidavit on which to petition for a fiat.

(*n*) A. B., of Oxford Street, in the county of Middlesex, linen draper, maketh oath that C. D., of Leicester Square, in the said county, draper, dealer and chapman, is justly and truly indebted unto him, this deponent, in the sum of £—— and upwards, for (or upon) (here state the subject matter of the debt.) And the deponent further saith that the said C. D. hath become and is bankrupt, within the true intent and meaning of the statutes made and now in force concerning bankrupts, as this deponent hath been informed and believes.

Sworn at the Public Office this — day of } A. B.
——, A. D. —, before me, }
Master in Chancery.

(*o*) When the bankrupt resides above forty miles from London, a country commission (now fiat) is necessary. 2 Cooke, B. L. 2.

Form of affidavit to obtain a country fiat.

(*p*) [Same as the affidavit to the end, *supra*, and then add.] And that the fiat of bankruptcy sought to be issued against him the said —, when obtained, is intended to be executed at Bury St. Edmunds, in the county of Suffolk, or within ten miles of the same, and not within forty miles of London.

Sworn at Bury St. Edmunds, in the county of Suffolk, this — day of —, A. D. 1834, before me, L. M., a Master Extraordinary in Chancery. }

Form of petitioning creditor's bond.

(*q*) Know all men by these presents, that I, A. B., of Oxford Street, in the county of Middlesex, linen draper, am held and firmly bound to the Right Honourable Henry Lord Brougham and Vaux, Lord High Chancellor of Great Britain, in £200, of good

bond need not be stamped, but must be sealed and delivered in the presence of two witnesses. This is usually executed at the Bankrupt Office, when a town fiat is to be issued. But if the creditor reside in the county, the bond is then usually there executed, and transmitted with the affidavit to a solicitor in town. (r)

Fifthly, In both cases the affidavit and bond are taken to and deposited at the Bankrupt Office and the fiat bespoke, and an entry is made in the docket book, and which proceedings are termed "*striking the docket*." At the time of leaving the affidavit and bond at the Bankrupt Office the fiat is bespoke, and £1. 12s. 6d. deposited with the deputy secretary, and on calling for the fiat at the appointed time, or obtaining it immediately, the further sum of £8 : 7s. 6d. is paid, so as to make up the £10, as required by the statute 1 & 2 W. 1, c. 56, s. 18.

Sixthly, After the affidavit and bond have been left at the Bankrupt Office and the fiat bespoke, the petition for the fiat, addressed, as we have seen, in all cases to the Lord Chancellor,

and lawful money of Great Britain, to be paid to the said Lord Chancellor,* or his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, I bind myself, my heirs, executors and administrators, jointly by these presents, sealed with my seal, dated this — day of — —, A. D. ——. The condition of this obligation is such that if the above bounden A. B. shall prove as well before his majesty's Court of Bankruptcy, [or in a country bankruptcy,†] before the commissioners to be appointed in a fiat against C. D. of —, draper, dealer and chapman, under that in bankruptcy act of C. D., of Bond Street in the county of Middlesex, draper as upon a trial at law, in case the due issuing forth of the process in bankruptcy against the said C. D. shall be contested and tried, that the said C. D. was and now is justly and truly indebted to the said A. B. in the sum of £100 or upwards, and hath become and is bankrupt within the true intent and meaning of the statutes made in that behalf in force concerning bankrupts, and if the said A. B. shall cause the said fiat and prosecution of bankruptcy to be proceeded in according to the directions of an act of parliament made in the sixth year of the reign of his late majesty, intitled an act to amend the laws relating to bankrupts, then this obligation to be void, or else to be in full force.

A. B. (L. S.)

Sealed and delivered in the presence of }
F. F. }
G. H.† }

(r) The penal part is the same as that of a bond to obtain a London fiat, but the condition thus varies.

The condition of this obligation is such that if the above bounden A. B. shall prove as well before the major part of the persons appointed to act as commissioners of bankruptcy, under a fiat in bankruptcy against C. D., as upon a trial at law, in case the due issuing of the said fiat be tried, that the said C. D. was justly and truly indebted to the said A. B. in the sum of £100 or upwards, and hath become bankrupt, and if the said A. B. shall cause the said fiat to be executed according to law, then this obligation to be void, or else to be in full force.

Form of bond to obtain a country fiat.

Sealed, &c.

A. B. (L. S.)

* The 6 G. 4, c. 16, s. 13, requires a bond, conditioned for proving an act of bankruptcy at the time of taking out the commission. It will be observed that neither the affidavit nor bond nor petition expressly states that there had been any

adequate trading, but merely that the party had become bankrupt.

† The bond is to be in a penalty of 200l., it need not be stamped, but must be attested by two witnesses.

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is prepared by the clerks in the Bankrupt Office; (s) but to prevent the possibility of mistake in the description of the bankrupt or otherwise, it may be advisable for the petitioning creditor's solicitor very carefully to prepare the full form, and request the clerk in the office to observe it, for certainly it is the particular duty of the solicitor to see that the fiat be in all respects correct.

Seventhly, The instrument or fiat having been engrossed on parchment, thereupon either the Chancellor or the Master of the Rolls or Vice-Chancellor, (or one of the Masters in Chancery acting under the appointment of the Chancellor for that purpose,) personally *signs* such fiat, and in terms thereby authorizes the petitioning creditor to prosecute his complaint *in the Court of Bankruptcy* (if it be a town bankruptcy; (t) or if *elsewhere*, then before certain *therein named Commissioners*, (u)

Form of petition
for a fiat.

(s) To the Right Honorable Henry Lord Brougham and Vaux, and Lord High Chancellor of Great Britain.

The humble petition of A. B. of Oxford Street, in the county of Middlesex, linen-draper, on behalf of himself and all other creditors of C. D. of Bond Street, in the said county, draper, dealer and chapman:—

Complaining, sheweth unto your Lordship, that the said C. D. being a trader, and using and exercising the trade of a merchant, dealer and chapman, seeking his trade or living by buying and selling, upon just and good causes, being indebted unto your petitioner in the sum of £100 and upwards, did lately commit an act of bankruptcy [or, “about the month of — last past did become bankrupt,] within the true intent and meaning of the laws concerning bankrupts, and that your petitioner hath filed such affidavit and given such bond as is by law required.

Your petitioner therefore most humbly prays that your Lordship will be pleased to issue your fiat, authorizing your petitioner, as such creditor as aforesaid, to prosecute his complaint in his Majesty's Court of Bankruptcy.

And your petitioner shall ever pray, &c.

Dated 1st October, A.D. 1834.

Form of petition
for a country fiat and
proceedings.

The same as a petition for a London fiat, excepting the last paragraph, in lieu of which conclude as follows:

Your petitioner therefore most humbly prays, that your Lordship will be pleased to issue your fiat, authorizing your petitioner, as such creditor as aforesaid, to present his complaint before such discreet and proper persons as your Lordship by such fiat may think fit to nominate and appoint to act as commissioners of bankrupt in that behalf.

A. B.

And your petitioner shall ever pray, &c.

Form of fiat in
a town bank-
ruptcy.

(t) Upon reading the petition made to me by A. B. of Oxford Street, in the county of Middlesex, linen draper, against C. D. now or late of Bond Street, in the county of Middlesex, draper, dealer and chapman and trader, and as trader indebted to the said petitioner in £ — and upwards, and as having committed an act of bankruptcy, and the said petitioner having made such affidavit and given such bond as by law required,* I hereby authorize the said petitioner to prosecute his complaint in his Majesty's Court of Bankruptcy. Dated this — day of — A.D.

Brougham, C.

The like, more
concise.

To his Majesty's Court of Bankruptcy.

I hereby authorize A. B. of, &c. to prosecute his complaint against C. D. in the Court of Bankruptcy.

Brougham, C.

Form of a fiat
for a country
bankruptcy and
proceedings.

(u) The same as the form of a London fiat, *supra*, to the asterisk, and then as follows, in lieu of the conclusion in that form, “I hereby authorize the said petitioner to prosecute his complaint before G. H. and I. K. esquires, and N. O. and P. Q. gentlemen, or before three or more of them, whom I nominate and appoint to act as commissioners of bankrupt in that behalf, of whom you the said G. H. and I. K. to be one.

Brougham, C.

The like in a
more concise
form.

Dated this

day of

1834.

I hereby authorize A. B. of, &c. to prosecute his complaint against C. D. of, &c. at Liverpool, in the county of Lancaster, before G. H. I. K. and L. M. esquires.

Brougham, C.

being persons previously named by the judges and approved by the Chancellor, and who are taken by rotation from the list in which their names are written.)

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We have seen that the circumstance of a town or country *fiat* having been *concerted* (as to get rid of a preference under an execution) is now declared not merely of itself to constitute any objection; (u) but a *concerted act of bankruptcy*, for the purpose of issuing a fiat, would not sustain it. (x) And although the mere circumstance of a fiat having been obtained by *concert* (as in order to get rid of a previous execution) constitutes no objection to the proceeding, yet if a fiat be obtained *fraudulently*, to deter others from striking a docket, and without any *bona fide* intent to proceed thereon, but with the view improperly to protect a private assignment to the petitioning creditor, it would be otherwise, at least against the latter. (y)

Enactments
and decisions as
to validity of
fiat, &c.

If the commissioner should find that the petitioning creditor's debt was insufficient to sustain the fiat, then he should also, when another debt is proposed to be substituted under the 18th sect. of 6 G. 4, c. 16, *expressly* find that such debt proposed to be substituted was incurred *not anterior* to such defective petitioning creditor's debt. (z) If a fiat be annulled on account of the insufficiency of the petitioning creditor's debt, it is always at *his cost*. (a) If a fiat be lost, a new one must be issued. (b)

The *residence* and name of the bankrupt must be correctly and *bona fide* described in the fiat, or it may on petition be superseded. (c) If there be a material mistake in a fiat, as in the name of the bankrupt, the same petitioning creditor may apply to the Court for leave to obtain a new fiat. (d) But the Lord Chancellor has no jurisdiction to order a fiat to be amended, and therefore the Court of Review will not, on motion, order the officer to deliver it out for the proposed purpose of amendment; (e) though in one instance, where no proceedings had taken place, an amendment in the name was

(u) 1 & 2 W. 4, c. 56, s. 42, but formerly it was otherwise, *ante*, 550, n. (g); and *Ex parte Bellwood*, 2 Dea. & Chit. 57; *Ex parte Mills*, 1 Mont. & Ayr. Rep. 511.

(x) *Marshall v. Barkworth*, 4 B. & Adol. 508; 1 Nev. & M. 279.

(y) *Ex parte Mucklow*, 3 Dea. & Chit. 25.

(z) *Ex parte Hunter*, 2 Dea. & Chit. 507; Eden, 3d ed. 49.

(a) *Ex parte Fletcher*, 2 Dea. & Chit. 574.

(b) *Levet*, 1 Montg. & Ayr. 308.

(c) *Tanner*, 2 Dea. & Chit. 563; *Dart*, *id.* 543; see prior law, Eden's Bank. L. 3d edit. 57; see the general rule as to the consequences of misdescription, *Ex parte Mills*, 1 Mont. & A. Rep. 310, 311. As to the fiat in general, see several cases, 1 Mont. & Bligh's Rep. 263 to 265.

(d) *Edwards*, 1 Dea. & Chit. 531.

(e) *Wright*, *id.* 547; *quare* the terms of the report, *Todd*, *id.* 319; *Montague's Bank. Cases*, 455, S.C.; *Walker*, 1 Dea. & C. 531; *Mont. Bank. Cases*, 510, S.C.

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permitted. (f) Where a joint fiat was issued against A. and B., and the debt was separate, it was holden void, and could not be rendered valid as a separate fiat against B. (g) And if a second fiat be issued pending negotiations, contrary to good faith, a motion to supersede the first fiat will be dismissed with costs. (h) When all the witnesses reside in one neighbourhood very distant from London, the Court, on a very full affidavit, may make an order that the fiat be directed to commissioners there, as in Northumberland, instead of being executed before a London commissioner. (i)

PROCEEDINGS
AFTER OBTAIN-
ING A FIAT.

Eighthly, The fiat issued by the Chancellor to be *prosecuted* in the Court of Bankruptcy is to be *filed* of record within *seven days* from its date, and no appointment for the opening of such fiat shall be made until it shall have been so filed. (k)

Ninthly, The petitioning creditor *must proceed* upon a fiat, on a London bankruptcy, within fourteen days after its date, and upon a fiat for *country proceedings* within twenty-eight days, or the same may be superseded. (l) But the time may be enlarged for opening a fiat, on affidavit that the petitioning creditor bona fide intends to prosecute the same, and that there is no composition pending or intended, and no connivance with the bankrupt. (m)

Tenthly, For the purpose of proceeding on a town fiat, the 11th of the General Rules of the 12th of January, 1832, we have seen, directs that an application shall be made to the registrar for an appointment for *opening the fiat*; and thereupon he is, in the presence of the solicitor applying for the same, to *allot* such fiat by ballot to *one* of the six commissioners; and after such allotment, the 12th rule directs the registrar to write upon the face of the fiat the name of the allotted commissioner before whom the fiat is to be opened. (n)

Eleventhly, To proceed on a fiat for London proceedings, it is said that the *messenger* of the Bankrupt Court must be employed to obtain an appointment by such allotted commissioner to open and proceed and receive the deposition of the petitioning creditor's debt, and of the trading and act of bankruptcy, and to adjudicate and proceed further upon the fiat. (o) But it should seem that the *solicitor* of the petitioning creditor

(f) *Graham*, 1 Dea. & Chit. 458.

(g) *Clark*, 1 Dea. & Chit. R. 544.

(h) *Ex parte Baker*, 2 Dea & Chit. 362.

(i) *Bolan*, 2 Dea. & Chit. 331; and see *Eden's Bank*. L² 3d edit. 60.

(k) Tenth General Rules and Orders of 12th January, 1832.

(l) Lord Rosslyn's order, 26th June

and 5 Nov. 1793; *Eden*, 3d edit. 65, 66, Append. 113; *Ex parte Henderson*, 2 Rose, 190.

(m) *Ex parte Smith*, 1 Mont. & A. 473; and see form of affidavit there suggested.

(n) *Ante*, 546.

(o) *Eden*, 3d edit. App. 113.

might properly obtain from the commissioner his appointment, so as to be certain that all proper parties will be in attendance.

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OF THE MEETING FOR OPENING THE FIAT AND ADJUDICATION.

Twelfthly, At the appointed time the allotted commissioner will sit at the Bankrupt Office in Basinghall Street, and the petitioning creditor and his solicitor with his witnesses to swear to his debt and to the trading and act of bankruptcy, must, in general, attend in *person*. On a town fiat the commissioner, having already taken a *general* oath of office, need not again take any oath; but on a country fiat the first proceeding at the meeting of the commissioners named in the fiat is for each to take the following oath—"I, A. B. do swear that I will faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me as a commissioner in a prosecution of bankruptcy against C. D., and that without favour or affection, prejudice or malice.—So help me God."

Of the meeting to open fiat and proceed to adjudication, &c.

Thirteenthly, In general the *petitioning creditor* must attend in person when the fiat is opened to prove his debt, as well before the London commissioner as before country commissioners, and the circumstance of his residence at eighty-five miles distance from the place of meeting was not admitted as an inadequate ground for dispensing with his personal attendance; (o) but if it be a much greater distance, as 200 miles, it might be otherwise. (p) So the petitioning creditor's presence at the opening of the fiat has been dispensed with on account of *age* and *illness*; and even the signature of the petition has been dispensed with. (q) Perhaps as the 1 & 2 W. 4, c. 56, s. 34, permits the *subsequent proof* of debts by *affidavit*, instead of requiring *personal* appearance as heretofore, less strictness might now be admitted as to the proof of the petitioning creditor's debt on opening the fiat.

At the first or opening meeting (which is private and entirely *ex parte* on behalf of the petitioning creditor, and no one can attend to resist or even protest against the proceeding,) on a *town fiat*, to be prosecuted at the Court of Bankruptcy, the commissioner first causes a preamble of the time of holding his Court and opening meeting to be written, as thus:

Preamble to the proceedings at first meeting.

At the Court of Bankruptcy, the 1st day of October, 1834.

Depositions and examinations, and other proceedings had,

(o) *Ex parte Cor*, 1 Dea. & Chit. 205; 1 Mont. & Bligh's Rep. 265.
Mont. Bank. Cas. 390.

(q) *Re Wood*, 1 Mont. 509.

(p) *Ex parte Ross*, 1 Dea. & Chit. 552;

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made and taken under a prosecution of bankruptcy issued against C. D., late of, &c. In case of a *country* proceeding, then follows a memorandum to the following effect:—

Memorandum of a commissioner on a *country* bankruptcy having qualified himself to act by taking the oath pursuant to the statute.

Memorandum, That I, G. H., Esquire, being nominated and appointed in and by a prosecution of bankruptcy awarded and issued against C. D., of, &c., bearing date the — day of —, A. D. 1834 instant, did take the oath prescribed by an act made on the 30th day of October, 1831, for commissioners to take before they proceed in any prosecution of bankruptcy.

G. H.

Witness, Y. Z.

Form of oath to be administered by the commissioners to the witnesses upon their examination under a town or country fiat.

The depositions of the petitioning creditor's debt, and of the trading and act of bankruptcy.

"You shall true answer make to all such questions as shall be put to you by virtue of this prosecution of bankruptcy awarded against C. D. So help you God." The deponent is thereupon to kiss the book, i. e. the *New Testament*, if a Protestant, and the *Old Testament*, if a Jew.

[Then follow, *first*, the petitioning creditor's deposition as to *his debt*, in compliance with his bond; *secondly*, the deposition of some third person as to the *trading*; thirdly, the deposition of a third person as to the *act of bankruptcy*. See several forms, Eden's Bank. L. 3d edit. 114 to 120; Stewart's Bank. L. 135, 136.]

If the commissioner be satisfied as to the sufficiency of the petitioning creditor's debt, trading and act of bankruptcy, he then *adjudicates* that the party has become a bankrupt to the following effect.

The form of Adjudication.

At the Court of Bankruptcy, the — day of —, A. D. 1834.

Memorandum. I, G. H., Esquire, one of the commissioners of his Majesty's Court of Bankruptcy, [*or if in the country*, "being a commissioner named and authorized in and by a fiat awarded and issued against C. D., late of —,"] upon good proof upon oath before me this day had and taken, do find that the said C. D. became a bankrupt within the true intent and meaning of the statute made and now in force concerning bankrupts, before the date and suing forth of the said fiat, and I do therefore declare and adjudge him bankrupt accordingly.

G. H.

Warrant of seizure.

At the same meeting the commissioner signs and seals his *warrant of seizure* of the bankrupt's estate and effects, addressed to a messenger and his assistant, and to all mayors, bailiffs, constables, headboroughs, and all other his Majesty's

subjects; (r) and there may also^o be his *search warrant* under his hand and seal. (s)

The commissioner at the same time appoints *two* days for *public meetings*, to receive and prove debts, and to take the bankrupt's surrender and examination. The *first* meeting for the choice of assignees, as well as the proof of debts, and the *last* meeting (which must be on the 42d day from the advertisement in the Gazette,) as well for the proof of debts as for the bankrupt's surrender and examination; but the bankrupt usually surrenders at the first meeting, for the sake of being protected from arrest; or he may surrender at the private meeting, which protects him until he has passed his examination. (t).

Appointment of the two public meetings.

At the private opening meeting also the commissioner is to elect, by ballot, an *official assignee*, as directed by the 18th General Rule of 12th January, 1832; and he is thereupon, according to rule 20, by instrument under his hand, to appoint an official assignee to the particular bankrupt's estate, and which appointment is to remain of record in the said Court of Bankruptcy; and certificates of such appointment; under the seal of the Bankrupt Court, are to be delivered to such assignee by the registrar, upon application for the same. And the commissioner may, under rule 25, give such special instructions to the official assignee as he may think the nature of the bankrupt's estate, or the particular case, in other respects, may require.

Appointment of the official assignee, &c.

Immediately after the adjudication of bankruptcy, should be prepared an *advertisement* of the fiat, the appointment of the two meetings at which the bankrupt is to surrender, and at either of which the creditors are to prove their debts, and at the first choose assignees, and at the last the bankrupt to finish his examination, and requiring all persons indebted to the bankrupt, or who have any of his effects, not to pay or deliver the same to the bankrupt, but to the official assignee, (describing him by name and residence,) or to give notice to the solicitor under the commission, naming him and his residence. (u) This advertisement must be *inserted* in the London Gazette, and the forty-two days are reckoned from that insertion. But a *memorandum* only of the appearance of the advertisement in the Gazette, and of the date thereof, with proper reference to the file to facilitate search, is to be made by the deputy registrar, in

Advertisement in Gazette.

(r) See form, Eden, B. L. 3d. ed. 120;
and 6 G. 4, c. 16, s. 27, 28, 29.
(s) *Ibid.* 121.

(t) Eden, 3d ed. 122.

(u) See form, Eden, B. L. 3d ed. 120.

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lieu of attaching a copy of the Gazette in the proceedings under the fiat. (x) The bankrupt is also to be *served* with a *formal summons* to attend at the two appointed meetings, then and there to be examined, and to make full and true discovery and disclosure of his effects, according to the directions of 6 Geo. 4, c. 6. (y)

FIRST PUBLIC SITTING.

Memorandum
of bankrupt
having surren-
dered, and
consequences.

At the *first public meeting*, or sitting, upon a town fiat, there is to be an entry upon the proceedings of a memorandum of the bankrupt having surrendered and submitted himself to be from time to time examined; and there is usually a further memorandum that the bankrupt, having been sworn and examined, states that he is not at present prepared to make a full disclosure and discovery of his estate and effects, and therefore prays further time for the doing thereof until the next day appointed in the London Gazette for that purpose. (z) And thereupon, in order to protect the bankrupt from arrest, the commissioner usually indorses a memorandum on his summons, that the bankrupt has so surrendered and prayed further time, and the grant thereof. (a)

Proof of debts.

The next proceedings are the *proofs of debts* and entries of *claims* by all the creditors who may think fit to attend at the first public meeting, with a view also of voting in the choice of assignees. (b) Formerly, except in some cases of illness and others requiring indulgence, every creditor *must have attended in person*, and sworn to and signed a written deposition of his debt, shewing the amount above 100*l.* and the consideration, and sometimes the time when it completely accrued due, and certainly before the act of bankruptcy. (b) But now we have seen that in all cases *any* creditor may make *proof of his debt by affidavit* sworn before one of the said judges of the Court of Review, or Commissioners, or before a Master in Chancery, ordinary or extraordinary; or in a particular prescribed manner, if living abroad; subject nevertheless to such rules and orders touching the *personal* attendance of every creditor, to make such proof according to the existing laws and practice in bankruptcy as the said Court of Review, with the consent of the Chancellor, shall from time to time make. (c)

(x) Rule 16 of 12th January, 1832.

(y) See form of Summons, Eden, B. L. 121.

(z) See forms, Eden, B. L. 3d ed. 122.

(a) See forms, *ibid.*

(b) Eden, 3d ed. 123.

(c) 1 & 2 W. 4, c. 56, s. 34.

The usual proof under a London fiat at the *first* public sitting is by the creditor in person, (d) because after proving he is at the same sitting to vote in the choice of the creditors' assignees, as directed by 1 & 2 W. 4, c. 56. (e) Each separate creditor makes a written *deposition* of his debt, which he is sworn to and signs; and he must at the time of proving state whether he has any security, and if he has, it must then be produced and exhibited; and where he has a security only from the bankrupt he must deliver it up for the benefit of the creditors before he can prove; but when another party is liable thereon, the creditor has a right to detain the security, in order to recover against him to the full extent of 20s. in the pound. (f)* When the creditor appears in person he must produce all securities, which must be excepted in the deposition, and the form of proof will be as in the note. (g)

If the creditor should reside a considerable distance in the country, or if residing in or near London he should prefer proving by *affidavit* under the permission of 1 & 2 W. 4, c. 56, s. 34, he may do so in the first instance; but still he may, under the same section, be required to attend in person, so as to be examined as to the sufficiency of the debt. The form of affidavit may be as in the note. (h)

At such *first* sitting the *choice of assignees* is to take place by the creditors present who have proved their debts. (i) By the 6 G. 4, c. 16, s. 61, all creditors who have proved their debts of

Choice of the
creditors' as-
signees.

(d) 6 G. 4, c. 16, s. 46. The 1 & 2 W. 4, c. 56, s. 34, gives the general power of proving by affidavit.

(f) Eden, 3d ed. 123.

(g) See several forms, Eden, 3d ed. Appendix, 124; Stewart's Bkpt. Law, 147.

(e) S. 20.

At the Court of Bankruptcy, London, 1st October, 1834.

A. B. of, &c., being sworn and examined the day and year and at the place above-mentioned, upon his oath saith, that C. D., the person against whom this prosecution of bankruptcy is awarded and issued, was at and before the date and suing forth of the same, and still is, justly and truly indebted to this deponent and G. H., his partner, in the sum of £—, for [here state the consideration of the debt, as goods sold and delivered by this deponent and the said G. H. to the said C. D.], and for which said sum of £—, or any part thereof, he, this deponent, hath not, nor hath his said partner, nor any other person to their use, to his knowledge or belief, received any security or satisfaction whatever.

Signature, A. B.

Form of proof of
a debt for goods
sold by a cre-
ditor in person.

(h) In the matter of C. D., bankrupt.

A. B. of, &c., maketh oath that C. D. of, &c., against whom this prosecution of bankruptcy is awarded and issued, was at and before the date and suing forth of the same, and still is, justly and truly indebted to this deponent in the sum of £—, for goods sold and delivered by the said deponent to the said C. D. And this deponent further saith, that he hath not, nor hath any person for his use, had or received any manner of satisfaction or security whatsoever for all or any part of the said sum of £—.

Signature, A. B.

Form of affida-
vit on which to
prove a debt.

Sworn at Manchester aforesaid,
this — day of —, A.D. 1834,
before me,

1st November, 1834.

Exhibited to me,

Y. Z. a Master Extraordinary.

O. P.

(i) 1 & 2 W. 4, c. 56, s. 20. Formerly the choice of assignees was at the *second* meeting, under 6 G. 4, c. 16, s. 61.

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10% or upwards are entitled to^o vote in the choice of assignees, which is determined by the majority in value of those who vote. One creditor may choose himself, if his debt be sufficiently large; and it is not necessary that an assignee should be a creditor. But the commissioner may reject any person so chosen, who shall appear to him unfit to be an assignee, and thereupon there is to be a new choice. (k) After the choice of assignees has been completed a *memorandum* thereof is written as part of the proceedings, and the assignees usually *subscribe* their acceptance of the trust, as thus: (l)

In the Bankruptcy of C. D.

1st December, 1334.

At, &c.

Memorandum
of the choice of
assignees.

Memorandum. This being the day appointed in the London Gazette for the choice of assignees of the estate and effects of C. D.: We whose names are hereunder written, being the major part of the creditors of the said C. D., present at this meeting, and who have proved our debts to be 10% and upwards, have chosen and do hereby nominate and choose L. M. and N. O. of London, merchants, to be assignees of the estate and effects of the said C. D.

A. B. for self & Son.

E. F. for self & Co.

G. H.

O. P.

Q. R., &c. &c. &c.

We accept of the said trust, and promise to execute a counter^o part of the said assignment. (m)

L. M.

N. O.

Second public
sitting and sub-
sequent pro-
ceedings.

At the *second* sitting the remaining debts are usually proved or claimed, and the bankrupt usually passes his last examination.

Dividends.

No *dividend* is to be made until after four months from the issuing of the fiat, nor later than twelve months; and there must be twenty-one days' notice in the Gazette before making it, and the accounts of the assignees must be first audited. (n)

Certificate.

The number of creditors who must sign the bankrupt's *certificate* depends on the *time*; until six months after the last

(k) 6 G. 4, c. 16, s. 61; Eden; 3d ed. 131, 132.

(l) Eden, 3d ed. 132.

(m) This form is continued in Stewart's

Bank. Law, 166; but since the 1 & 2^o W. 4, c. 56, s. 25 & 26, no assignment is necessary.

(n) 6 G. 4, c. 16, s. 107.

examination have expired, the signature must be by *four-fifths* in number and value of the creditors for 20*l.*; but *after* six months, it suffices if the certificate be signed by *three-fifths* in number and value, or nine-tenths in number only. (n)

It will be observed that in this summary, after stating the previous law and the *change in the practice in bankruptcy* introduced by 1 & 2 W. 4, c. 56, and the general rules and orders thereon, principally of 12th January, 1832, we have merely considered the *ordinary course of practice* in obtaining the fiat, opening the same, obtaining adjudication of the bankruptcy, the proceedings at the *first* public sitting for the proof of debts, mode of proof, and choice of assignees; and the *second* or last public meeting, and the law respecting dividends, and signing the certificate. The above concise consideration of these must suffice, as the statement of the whole law would occupy the space of two or three volumes, and exceed the limits of the scale of this work.

SECT. XIV.—Of Courts of Error and of Appeal from the Decisions of the preceding and other Courts.

Having thus considered the *jurisdiction* and *general practice* of *eleven* of the *principal Courts in England*, which were constituted for the purposes of distinct *original* jurisdictions of various descriptions, *viz.* *legal*, whether civil or criminal, *equitable*, *ecclesiastical*, *maritime*, *international*, or prize, and of *bankruptcy*, and some of which have also jurisdiction as Courts of Appeal and Error from Inferior Courts; we have now to examine the jurisdiction and general practice of those Courts, which have little if any *original* jurisdiction, but act and decide only as Courts of Error or Appeal from the judgments or the proceedings of the other Courts, which we have thus examined, and from the decisions and acts of various foreign Courts. For this purpose there are the three Courts, 1st, Of Exchequer Chamber; 2dly, The Court of the Judicial Committee of the Privy Council; and, 3dly, The Judicial Court of the House of Lords. The *first* is merely a Court of Error from the final judgments of the Superior Courts of *Law*, as from the King's Bench, Common Pleas and Exchequer, in actions *commenced* in one of those Courts. (o) The *second* has no appellate jurisdiction either from the superior Courts of Law or of Equity, but has appellate jurisdiction principally from the Ecclesiastical Courts of England, the Admiralty Court, and the almost innumerable Courts in his Majesty's islands and dominions

Of these Courts
in general.

(n) 6 G. 4, c. 16, s. 122; Eden, 3d ed. 396. (o) *Ricketts v. Lewis*, 1 Cro. & J. 11.

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abroad; whilst the third has *appellate jurisdiction*, not only from the decisions of the Exchequer Chamber upon the judgments of the Court of King's Bench, Common Pleas and Exchequer, in actions there *commenced*, but also upon the judgments of the King's Bench in error from inferior Courts, and also on appeals from decrees in the Equity Courts, which we have before considered, and upon appeals and writs of error from Scotland and Ireland.

General observations.

We propose at present to confine our observations principally to the *jurisdiction* of these Courts of Error and Appeal, and the *general* course of practice therein. The *detail* of all the *practical* modes of conducting proceedings in error or appeal will be more properly arranged in the concluding parts of this work.

First, The Court of Exchequer Chamber.

First,
EXCHEQUER
CHAMBER.

The 1 W. 4, c. 70, s. 8, we may remember, materially alters the previous enactments and law regulating writs of error, and enacts, "that writs of *error* upon *any judgment*, (o) given by "any of the said Courts, (i. e. the King's Bench, Common Pleas and Exchequer of Pleas,) shall hereafter be made returnable *only* before the judges, or judges and barons, as the case may be, of the *other two Courts* in the Exchequer Chamber, any law or statute to the contrary notwithstanding; and that a *transcript* of the record only shall be annexed to the return of the writ; and the Court of Error, after errors are duly assigned and issue in error joined, shall at such time as the judges shall appoint, either in term or vacation, review *the proceedings*, and give judgment as they shall be advised *thereon*; and such proceedings and judgment, as altered or affirmed, shall be entered on the *original record*; and such further proceedings as may be necessary thereon shall be awarded by *the Court in which the original record remains*; from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament."

Every word of this enactment demands attentive consideration, as it so materially alters the previous practice in error. Formerly, very absurdly, a writ of error upon the judgment of the *Court of Common Pleas* was always returnable in the King's Bench, (although the judges of the former Court usually are as competent to decide upon the matter of law as those of the

(o) But this does not extend to errors in judgment on a matter of *fact*, as for *infancy* or *coverture* of the defendant, when a writ of error *coram nobis* or *vobis* must still be brought in the same or next Su-

perior Court as heretofore; nor do these writs extend to judgments in error of the King's Bench upon judgment of an *Inferior Court*, *post*.

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latter,) and whether the judgment of the Common Pleas was reversed or affirmed, a further writ of error from such judgment of the King's Bench was afterwards returnable in the House of Lords, without being previously examined in the Exchequer Chamber. (p) From a judgment in the King's Bench, when the action had been commenced *by bill* or *latitat*, the writ of error was returnable in the Exchequer Chamber, except in *replevin* and a few other actions; (q) but if it had been commenced by *original*, then it was to be returnable in Parliament, without any intervening examination in the Exchequer Chamber; (r) and from the judgment of the Exchequer of Pleas, the writ of error was returnable in the Exchequer Chamber, before the Lord Chancellor, Lord Treasurer, and the Judges of the Courts of King's Bench and Common Pleas. But *now*, by the above enactment, a writ of error, in respect of any matter merely of *law*, upon *any* judgment of the Court of King's Bench, Common Pleas, or law side of the Exchequer, in an action *commenced* in either of those Courts, is to be returnable *only* in the Exchequer Chamber, before a Court holden before *different judges*, according to the Court, the judgment of which is to be impeached, viz., before the judges, or judges and barons of the two Courts, who had not given the judgment, and the attendance of the Chancellor and Lord Treasurer is in all cases dispensed with. So that since this statute the judges of the King's Bench and the barons of the Exchequer of Pleas constitute the only Court of Error upon a judgment of the Common Pleas; the judges of the Common Pleas and such barons constitute the Court of Error upon a judgment of the King's Bench; and the judges of the King's Bench and Common Pleas constitute the Court of Error upon a judgment of the Exchequer of Pleas; and from all judgments in error of the Court of Exchequer Chamber the writ of error lies only to the House of Lords. But the term *any* judgment is not so comprehensive as might be supposed, for it is qualified by the *subsequent* words in the same section, requiring the Court of Error to *review the proceedings* and give judgment *thereon*; which words impliedly confine the words *any* judgment to objections apparent on the face of the record, and do not extend to errors *in fact extrinsic* from the record, and therefore this section is confined to judgments *defective in law* upon the *face of the pleadings and whole record*, without regard to *extrinsic facts*, and the statute does not extend to what are termed errors in

(p) 3 Bla. Com. 411; 1 Rol. R. 264;
2 Bulstr. 162.

(r) 4 Inst. ch. 1, p. 22; 2 Hen. Bla.
204; 1 Saund. 346 f, note 4.

(q) 27 Eliz. c. 8.

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fact, which are not apparent on the face of the record, but consist of some *extrinsic fact*; such as *infancy* of the defendant, who had appeared and been defended by an attorney, and the objection was not raised until after judgment, (s) or *coverture*, (t) or *death* of a defendant before verdict. (u) In these cases a writ of error coram nobis or vobis is, notwithstanding this statute, still returnable in the same Court in which the judgment was given, or in the King's Bench as heretofore. (x) Another reason has been assigned why the 1 W. 4, c. 70, s. 8, does not extend to writs of error coram nobis or vobis, viz., because those writs of error only contain a commission to try errors, and no certiorari. (y) It has also long been supposed that no writ of error for error *in fact* can be brought in the Exchequer Chamber or House of Lords. (z) Nor does a writ of error lie from the judgment of the Court of King's Bench, reversing or affirming the judgment of an *inferior Court*, but in that case the writ of error lies direct from the King's Bench to the House of Lords. (a)

It will be observed that the original record itself is to remain in the Court in which the original judgment was given, and only a copy of the pleadings and proceedings, termed a *transcript*, is to be sent to the Exchequer Chamber, and thereupon the supposed errors are assigned, and joinder in error takes place in that Court, and after the judges there have given their judgment, the same is to be entered on the original record in the Court where it remains, and execution is to be issued by the latter Court.

In general all judicial acts must be performed in *term time*, but this act, it will be observed, enables the judges constituting the Court of Error to review the proceedings, and give their judgment of reversal or affirmance in *vacation*. (b) That enactment was to enable the judges to fulfil their arduous judicial duties in their own Courts during the terms, and to select some more convenient day or days in vacation for hearing the arguments, and deciding upon such transcripts in error.

It will be observed that the judges of the Court of Error are merely to *review* the *proceedings*, and give judgment as

(s) Style, 406; *Bird v. Pegg*, 5 B. & Ald. 418; when not, *Goodright v. Wright*, 1 Stra. 33.

(t) Rol. Ab. 747, 748, 752; Style, 254, 280; Rol. R. 53.

(u) 2 Saund. 101.

(x) *Castledine v. Mundy*, 4 B. & Adol. 90; *Binns v. Pratt*, 1 Chit. R. 369, ante, 360.

(y) 1 Dowl. Statutes, 375, referring to

Tidd's Forms, c. 44, s. 2 to 6.

(z) Per Lord Holt, C. J. Shower's R. 171, 177; *Hopkins v. Wrigglesworth*, 2 Lev. 58; 2 Saund. 101 a; *sed quare post*, House of Lords, 595, n. (g).

(a) *Ricketts v. Lewis*, 2 Crompt. & J. 11; 2 Tyr. R. 15, S. C.

(b) There was a similar power to hear and determine in *vacation* created by 3 G. 4, c. 102, s. 2 & 4.

they shall be advised *thereon*.^(c) A writ of error is therefore only sustainable in the Exchequer Chamber in respect of some *substantial apparent objection*, not aided either at common law or by any statute of jeofails, and which can be discovered upon *reading the transcript* or copy of the *proceedings* of the Court below, and consequently never on account of any *extrinsic fact or objection*. The only tenable objections are such *substantial defects* in the *pleadings* of the party in whose favour the judgment below has been given, as are not aided after verdict or judgment by default or for want of a special demurrer, as required by 4 Anne, c. 16; or in respect of defects in *legal merits* in the case itself as disclosed by a *demurrer to the evidence*, *bill of exceptions*, or *special verdict*, (and not upon a mere special case or matter disclosed upon some *collateral* motion, rule nisi, or rule absolute, which never are entered upon the roll of proceedings nor appear therefrom,) each of which is considered as part of the original record, and must appear on reading the whole transcript. The Court of Exchequer Chamber is not a Court of *Appeal*, so as to re-investigate the *merits* upon any matter of *fact*, as we shall see the Judicial Committee of the Privy Council is, and it has therefore no power to convene a jury or to institute any collateral inquiry. As constituted of the learned judges of the *two* Courts, instead of the four judges of the Court below, it is supposed that this Court will arrive at a more certainly correct and satisfactory decision than such Court below; and it is confined by the very terms of the statute to the examination of the *transcript*, and deciding upon the sufficiency of the judgment *thereupon* given.

Since the act 1 W. 4, c. 70, it has been held, that a writ of error subsequently sued out on 27 Eliz. c. 8, was coram non iudice; (c) and after a judgment in King's Bench upon a writ of error from the Common Pleas, or from^(d) an inferior Court, no writ of error lies to the Court of Exchequer Chamber, as constituted by 1 W. 4, c. 70, s. 8. (d)

In ordinary cases, when the pleadings are common and simple, it can scarcely ever occur that a writ of error in the Exchequer Chamber can be sustainable; but when the declaration or special plea is special, substantial defects not unfrequently arise, and the judgment may then, on writ of error in the Exchequer Chamber, be reversed.

There may, however, be a writ of error founded on matters of *fact* when disclosed by a *bill of exceptions*, signed by the judge

(c) *Gurney v. Gordon*, 2 Tyr. R. 16.

(d) *Ricketts v. Lewis*, 2 Tyr. R. 15; 2 Crompt. & J. 11, S. C.

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who tried the cause, and which by annexation becomes part of the entire record, (e) or by a *demurrer to evidence*, or by a *special verdict*; and on a bill of exceptions the Court of Error may look to the whole evidence on both sides, to see whether the verdict was sustained by the evidence, and whether upon the *whole record with its annexations* the party was entitled to judgment. (f) But it has been recently held in the House of Lords that, in arguing a writ of error, the counsel can rely only upon objections especially suggested to the judge, and raised by the bill of exceptions, and the same reason applies to writs of error, returnable in the Exchequer Chamber. (g)

One general rule prevails in all Courts of Error, and certainly in the Exchequer Chamber and House of Lords, viz. not to inquire into the propriety of the *rules and practice* of a Court below, for regulating either its *general practice*, or a proceeding in a particular cause, as for amending a declaration, striking out pleas, or granting a new trial. (h) Tindal, C. J. observed, (i) "the practice of the Courts below is a matter which belongs by law to the *exclusive discretion* of the Court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is therefore left to their own government alone, without any appeal to or revision by a superior Court." (k)

(e) 3 Tyr. R. 509.

(f) Per Bayley, B. in *Smith v. Latham*, 3 Tyr. R. 527; *Vines v. Corporation of Reading*, 1 Young & J. 4.

(g) *Lucas v. Nockells*, cited in *Wright v. Tatham*, 1 Adol. & Ellis's R. 7, note (a) and 15; and see post, 577, 578.

(h) *Gulley v. Bishop of Exeter*, 10 B. & C. 584; *Mellish v. Richardson*, 9 Bing. 126.

(i) *Mellish v. Richardson*, 9 Bing. 126.

(k) The opinion of the judges in a recent case upon the limited powers of a Court of Error as delivered by Tindal, C. J. are so exceedingly illustrative, that it is expedient here to transcribe them. His lordship observed, "the questions proposed by your lordships to his Majesty's judges are these, viz. first, whether it is competent to a Court of Error to examine the propriety of an amendment of the record made by the Court below, being a Court of Record, the order for the amendment being sent up as part of the record; secondly, whether, supposing it to be competent, an amendment made by the Court of Record in which the action was originally brought, in the manner and under circumstances similar to those stated in the case of *Mellish v.*

Richardson, would be lawfully made. Upon the first of these questions his Majesty's judges are of opinion, that it is not competent to a Court of Error to examine the propriety of an amendment of the record made by the Court below, being a Court of Record, although the order for the amendment is sent up as part of the record.

"The proper object of a writ of error is to remove the final judgment of the Court below for the revision of the superior Court, in order that such Court, from the premises contained in the record of the inferior Court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the Court below.

"These premises are the pleadings between the parties, the proper continuance of the suit and process, the finding of the jury upon an issue in fact, if such has been joined, and lastly, the judgment of an inferior Court.

"All these premises, from which such judgment has been derived, the parties to the suit below have the right *ex debito justitiæ* to have upon the record.

"But the orders or rules for amend-

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It has been shewn in a preceding page that formerly the Court of Delegates, and from thence occasionally a Commission of Review, were the Courts of *Error*, or rather of *Appeal*, from the decrees and proceedings of the Superior *Ecclesiastical* Courts, and of the Court of *Admiralty* and *Prize* Courts, and from most *foreign Courts*; (k) but that these were repealed by 2 & 3 W. 4, c. 92, which also enacts that no Commission of *Review* shall be granted, and that in lieu of an appeal to the delegates, or any Commission of Review, the 3 & 4 W. 4, c. 41, constitutes "*The Judicial Committee of the Privy Council*" the Court of Appeal, not only from the *Ecclesiastical* Courts, but also from the *Admiralty* Court and *Prize* Court, and most of the Courts in the *foreign dominions* of his majesty. (l)

The first section of this important act declares and enacts what persons shall constitute the judges of this new Court, and

ment of proceedings made by a Court in the progress of a suit therein depending, do not fall within the description of any part of the record; but such orders are strictly and properly matters of practice in the progress of the cause, regulated by the power of amendment which the Courts of law possess, either by the common law, or by the statutes of amendment which have been from time to time enacted by the legislature for that purpose.

"The practice of the Courts below is a matter which belongs by law to the exclusive discretion of the Court itself, it being presumed that such practice will be controlled by a sound legal discretion. It is therefore left to their own government alone, without any appeal to or revision by a superior Court. And we cannot but observe, that no precedents have been cited at the bar in which an entry similar to that contended for by the plaintiff in error is to be found.

"So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that when it was found expedient that the opinion in point of law of the judge who tried the cause should be made the subject of revision by a superior Court, the Statute of Westminster the second (13 Edw. 1) expressly gave authority for that purpose by a bill of exceptions.

"We think, therefore, that it is not competent for the superior Court to examine into the propriety of the amendment, which is left to the sole discretion of the Court by which it has been

made. And if this be so, then the circumstances for the orders for the amendments being put upon the record in this instance, cannot have the effect of giving competency to the superior Court to revise the propriety of such amendment. For if the grounds of the amendment are not in themselves removable by the writ of error, and if the parties to the suit have not *ex debito justicie* the right to put the rules and orders for the amendment upon record, then the superior Court would have, or would not have, authority to inquire into the propriety of the amendments, according as the inferior Court did or did not return, in the particular instance, the order by which the amendment is made.

"One of his Majesty's justices has felt some doubt and difficulty in acceding to this opinion, but upon the whole acquiesces in its propriety.

"Such being the opinion of the judges on the first question submitted to them by your lordships, it becomes unnecessary for them to offer any upon the second."*

(k) And see 3 Bla. Com. 66 to 71.

(l) *Ante*, 309; and see the statute 3 & 4 W. 4, c. 41, and orders, with the valuable notes of Mr. Knapp, in his reports of decisions in the Privy Council, vol. ii. Appendix, v. to xxv. Those reports contain the decisions in the Privy Council, and all students of law desirous to extend their knowledge, especially as regards the principles of law, will do well to read those reports, together with Mr. Knapp's sensible and accurate notes.

* *Mellish v. Richardson*, 9 Bing. 125.

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fixes its style. It in part recites the 2 & 3 W. 4, c. 92, for transferring the power of the High Court of Delegates, both in ecclesiastical and maritime causes, to his Majesty in Council; and that by letters-patent, certain persons, members of his Majesty's Privy Council, together with others, being judges and barons of his Majesty's Courts of Record at Westminster, had been appointed to be his Majesty's Commissioners, for receiving, hearing and determining appeals from his Majesty's Courts of Admiralty in causes of *Prize*, (m) and that from the decisions of various Courts of judicature in the *East Indies*, and in the *plantation colonies* and other dominions of his Majesty abroad, an *appeal* lies to his Majesty in Council; and that matters of appeal or petition to his Majesty in Council *had usually been heard before a committee* of the whole of his Majesty's Privy Council, who had made a report to his Majesty in Council, whereupon the final judgment or determination had been given by his Majesty; and reciting that it then was expedient to make certain provisions for the *more effectual hearing and reporting* on appeals to his Majesty in Council, and on other matters, and to give such power and jurisdiction to his Majesty in Council as thereafter mentioned, then enacts and declares *the persons who* shall form a committee of his Majesty's said Privy Council, and enacts that they shall be styled "*The Judicial Committee of the Privy Council*," and then empowers his Majesty by his sign manual to appoint any *two other persons, being privy councillors, to be* members of such committee. The persons enumerated, who *virtute officii* are to be members of such committee, are at least *eleven*, viz., the President of the Privy Council, Lord Chancellor, Lord Keeper, or First Lord Commissioner of the Great Seal, the Chief Justice of the King's Bench, Master of the Rolls, Vice-Chancellor, Chief Justice of the Common Pleas, Chief Baron of Exchequer, Judge of the Prerogative Court of the Archbishop of Canterbury, Judge of the Court of Admiralty, and Chief Judge of the Court of Bankruptcy, and every other member of the Privy Council, *who has filled* either of those respective high offices; and the concluding part of section five enables his Majesty to summon any *other member* of the *Privy Council* to attend the meetings of such committee.

The fifth section enacts that at least four members of such committee shall be present, viz., "that no matter shall be heard, nor shall any order, report, or recommendation be made by

(m) And see 22 G. 2, c. 3; and 2 Knapp's R. ii. note *, and see *Hill v. Reardon*, 2 Sim. & Stu. 431; and 2 Russ.

R. 608, *ante*, vol. i. 818, as to questions of prize.

“the said Judicial Committee, in pursuance of that act, *unless* CHAP. V.
in the presence of at least four members of the said commit- SECT. XIV.
tee; and that no report or recommendation shall be made to
 “his Majesty, unless a *majority* of the members of such Judi- 2, JUDICIAL
 cial Committee present at the hearing *shall concur in such* COMMITTEE OF
report or recommendation.” PRIVY COUN-
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The sixth section enacts, “that in case his Majesty shall re-
 quire the attendance at the committee of any member of the
 Privy Council, who shall be a judge of either of the superior
 Courts, such arrangement shall be made by the judges for
 dispensing with the attendance of such judge, upon his
 ordinary duties, as may be necessary and consistent with the
 public service.” And with the same object the twenty-fifth
 section empowers his Majesty to appoint one of the barons
 of Exchequer to sit in equity, in the absence of the chief
 baron, when attending the Judicial Committee of the Privy
 Council. (n) And the twenty-sixth section enables two judges of
 the Court of Review, during the absence of the chief judge
 of that Court, to form a Court of Review in bankruptcy. (o)

The second section enacts, “That all *appeals or applica-*
tions in prize suits, and in all other suits or proceedings in
the Courts of Admiralty or Vice-Admiralty Courts, or any
other Court in the plantations in America, and other his Ma-
jesty's dominions or elsewhere abroad, which might then be
made to the High Court of Admiralty in England, or to the
Lords Commissioners in prize cases, shall be made to his Ma-
jesty in Council only.” (p)

(n) And see *ante*, 150, 151

(o) It will be obvious that if in appeal could be heard *throughout*, and the report thereon unanimously agreed upon *by the eleven persons* thus constituting such Court of Appeal, the decision could not fail to be most satisfactory, because the aggregate of those persons combines the highest intelligence upon every subject of litigation that can possibly arise, viz the principles of common and statute law of England, relative to temporal affairs, whether civil or criminal—the principles of equitable rights and remedies, and the principles upon which the ecclesiastical, maritime and international laws are founded—and lastly, the principles of the law applicable to cases of bankruptcy and insolvency, and by the assistance of members of the Privy Council, who have held the office of judge in the East Indies, or other his Majesty's dominions beyond sea a degree of familiar knowledge of foreign laws and customs is, under the thirtieth section of the act, combined, so as to enable the eminent personages hold-

ing the highest stations as judges here, in their various departments, to apply with effect their knowledge to questions upon foreign law that can be brought before them. But the difficulty is in the selection of appeals that are lengthy and cannot be heard and disposed of at one meeting of this judicial committee to secure the attendance throughout of the same distinguished personages to the whole of the hearing and discussion of a case, before the report thereon is made, and which is so essential to the perfection of justice. See an instance in *Long v. Commissioners for Claims in France* 2 Knapp's R. 59, note *, and see the Lord Chancellor's Observations on the defective state of administering justice in the House of Lords, *post*, 587, note (h)

(p) Before this enactment it was held in *The Tabus*, 2 Rob. R. 249, that appeals from the Vice Admiralty Courts in the colonies were properly laid to the High Court of Admiralty and not to the Privy Council

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The Courts
from whose
proceeding an
appeal may lie.

The third section enacts, "That all *appeals*, or *complaints* " *in the nature of appeals*, which might previously have been " brought before his Majesty in Council, from or in respect of " the *determination, sentence, rule or order of any Court, judge* " or *judicial officer*, shall be referred to the said Judicial Com- " mittee, and shall be heard by them, and a report or recom- " mendation thereon shall be made to his Majesty in Council, " for his decision thereon, as heretofore, in the same manner " as had been theretofore the custom with respect to matters " referred by his Majesty to the whole of his Privy Council, " or a committee thereof, *the nature of such report or recom-* " *mendation being always stated in open Court.*"

Upon the effect of the first part of this section it has been observed, that it would be difficult to enumerate *all the Courts*, whose decision, previously to the passing of this act, might have been brought before the King in Council, and which, *under* this act, may *not* be referred to the Judicial Committee. They may be classed under three heads; as, *first*, Courts within the kingdom; *secondly*, Courts of the islands near the kingdom; and, *thirdly*, Courts in distant dominions of his Majesty. Those of the *first*, are appeals from the decision of the Lord Chancellor in England and Ireland, sitting *in lunacy*; (q) and from the Court of the Warden of the Stanneries in Cornwall, if there happened to be no Prince of Wales, to whom in his council as Duke of Cornwall the appeal properly lies; (r) *secondly*, appeals lie to the Privy Council from the Isle of Man and other islands near England; (s) and *thirdly*, are appeals from the *colonies*, as from the East and West Indies, &c. (t) The general rule with regard to appeals from the colonies appears to be, whenever no limitations have been imposed upon them, either by orders in council, or instructions to the governor, or the charters of their Courts, or acts of parliament, that appeals are to be received upon petition to the council, from *all courts* in the King's dominions abroad, on the ground that it is the right of the subject, without express power, to appeal to the sovereign to redress all wrong done to them in any Court of Judicature; (u) but clauses restrictive of or limiting this right of appeal, must of course be construed and given effect to according to the intention of the qualification. (x)

(q) 2 Knapp's R. iv. note †; and see *Grosvenor v. Drax*, 2 Knapp's R. 82, where on an appeal from the Chancellor in lunacy, the Privy Council reversed his order, as made after the death of the lunatic, without jurisdiction, as the proceeding should have been by bill filed.

(r) 2 Knapp's R. iv. note †.

(s) 2 Knapp's R. iv. note †; as to the island of Jersey, see order, 13th May,

1572; 2 Knapp's R. v. in note.

(t) 2 Knapp's R. iv. note †.

(u) 2 Knapp's R. iv. note †; *Christian v. Corren*, 1 P. Wms. 329; see argument in *Cuvillier v. Aylwin*, 2 Knapp's R. 77.

(x) 2 Knapp's R. v. in note, *In matter of Nahon and Pariente*, 2 Knapp's R. 67, and *Austin v. Cuvillier*, *id.* 72; *In re Tappen*, 2 Knapp's R. 201.

With respect to the *nature* of the *proceeding* to be appealed against, it will be observed that the terms of the third section are comprehensive, and include not only *final sentences*, but all determinations, *rules* and *orders*, which may be interlocutory or in the course of a suit. From a proceeding in England a writ of *error* in general only lies upon a judgment final or interlocutory, as a judgment by default; but this section is obviously more comprehensive, and whenever, independently of this statute, the particular constitution of a foreign Court, or law applicable to it, or the practice, has permitted an appeal from an interlocutory rule, order or other proceeding, this statute clearly authorizes the continuance, and renders an appeal to the Judicial Committee in a similar case sustainable, and it is necessary to ascertain the law applicable to the particular Court. Thus, from Jersey the proceeding appealed against must have occurred *en fin de cause*. In the West Indian and American colonies, where the English law prevails, the practice has been always to admit appeals from all interlocutory orders in Equity, but not from those at common law. A less restricted rule has been observed in the King's Court at Bengal, the words of whose charter direct them to allow appeals from all judgments, decrees, or rules, or orders. (y) In the charter of the King's Courts at Madras, Bombay, and Prince of Wales's Island, the words directing the Courts to grant leave to appeal, are from any "judgment or determination," which words it is now settled are not confined, as once supposed, to final judgments, (z) unless it clearly appear they were so intended, as in the Charter of Justice granted to the town of Gibraltar, (a) or where the right of appeal is by statute or otherwise confined to cases of claims, exceeding a named sum, as 500*l.*, in the Upper and Lower Canada. (b) But it is no ground of appeal that the Court below discredited the testimony of the witnesses improperly. (c) Nor can the power of Colonial Courts to prevent advocates, who misconduct themselves, from practising before them, be disputed. (d) And it seems that objections cannot be made to a decree at the hearing before the Privy Council that were not made in the Court

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or final order,
or sentence on
appeal may lie.

(y) 2 Knapp's R. iv. v. note t.

(z) *Syed Alley v. East India Company*, 1 Knapp's R. 331, in note *; overruling *Johnston v. East India Company*, 1 Stra. 18; and 2 Knapp's R. v. in note.

(a) *In re Nahon and Pariente*, 2 Knapp's R. 66; *In re Tappen*, 2 Knapp's

R. 201.

(b) *Cuillier v. Aylwin*, 2 Knapp's R. 72.

(c) *Santacana v. Ardevol*, 1 Knapp's R. 269.

(d) *Justices of Antigua*, 1 Knapp's R. 267.

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below. (e) But where a party has been denied his right to appeal, according to the charter of the Court, through the erroneous construction of it by that Court, the Privy Council will, upon a special petition, grant leave to appeal. (f)

It will be observed, that the concluding part of the *third* section imperatively requires that the *report or recommendation* of the majority of the members of the Judicial Committee shall always *be stated in open Court*; and this accords with the previous practice declared to be, "It is usual at the Privy Council for the presiding law lord to deliver the *grounds of judgment*, which being thus known and reported tend to settle general principles and establish uniformity of decision." (g)

The 4th section entitles his Majesty to refer to the Judicial Committee for hearing or consideration, any such *other matters* whatsoever, as his Majesty shall think fit, and enacts, that such committee shall thereupon hear or consider the same, and advise his Majesty thereon in manner aforesaid.

The 20th section regulates the *time of appealing*, but without fixing any limit, and merely enacts, that where any such time shall be fixed by any law or usage the same shall be observed; and where there is no law or usage on the subject, then within such time as shall *be ordered* by his Majesty in Council, who is also authorized to *alter* any existing rule or order. It is stated that the established usage at the Privy Council has long been, that if an appellant has not presented his petition of appeal within a year and a day after he has obtained permission to appeal from the Colonial Court, the respondent may present a petition to have it dismissed, and obtain an order of course to that effect on the next meeting of the committee to which it stands referred. (h) However, the appellant may petition to dismiss the latter petition, and has been allowed to prosecute his appeal upon reasonable excuse after a delay even of six years. (i) The 22d and 23rd section authorizes his Majesty to direct the East India Company to bring on certain specified appeals, viz. appeals from the Sudder Dewanny Adawlut Courts in the East Indies to a hearing, notwithstanding the death of parties, and to appoint agents and counsel for the different parties in such appeals, and to make such orders for security and payment of costs as his Majesty in Council should think

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The prescribed time of appealing.

(e) *Frankland v. M'Gusty*, 1 Knapp's R. 274; and see 1 Adol. & Ellis, R. 15, S. P.
(f) *Elphinstone v. Berdrechund*, 1 Knapp's R. 332.

(g) See the special report of the commissioners appointed to inquire into the practice and jurisdiction of the Ecclesi-

astical Courts, dated 25th Jan. A. D. 1831.

(h) 2 Knapp's Rep. xiii, n. *, where see the further practice as to time.

(i) *East India Company v. Syed Alley*, 1 Knapp's R. 332; and see *Orphans' Board v. Van Reenew*, id. 83, 93; and *Ungenholly v. Hunter*, id. 173.

fit. And accordingly his Majesty, by three orders in council of 4th Sept. and 18th Nov. 1833, directed eighteen appeals from Bengal, ten from Madras, and fifteen from Bombay to be brought to a hearing. (k)

The 24th section enabled his Majesty in Council from time to time to make rules and orders regulating the *mode, form, and time* of appeal to be made from the Courts of Sudder Dewanny Adawlut, or any other Courts of judicature in *India or elsewhere* to the eastward of the Cape of Good Hope, and to make regulations for preventing delay in making or hearing such appeals, and as to the expenses attending such appeals, and the amount or value of the property in respect of which any such appeal may be made.

The 19th section authorizes the president of the Privy Council to require the attendance of witnesses and production of documents by writ of *subpœna ad testificandum* or of *subpœna duces tecum*; and in case of disobedience the witness is guilty of a contempt of the Judicial Committee and to the same penalties as if the writ had issued out of the Court of King's Bench. The 9th section directs that every witness shall be examined on oath, or affirmation if he be a Quaker or Moravian, to be administered as therein directed, and that if the witness shall swear falsely he shall be indictable for perjury and punished accordingly.

The 7th section authorizes the Judicial Committee in any matter referred to them to examine *witnesses* by word of mouth and either before or after examination by deposition, or to direct the deposition of any witness to be taken in writing by the Registrar of the Privy Council or by such other person, and in such manner, order, and course as his Majesty in Council or the Judicial Committee shall appoint and direct.

The 8th section authorizes the Judicial Committee to direct that such witnesses shall be examined or re-examined and as to such facts, notwithstanding any such witness may not have been examined or no evidence may have been given on any such fact in a previous stage of the matter; and his Majesty in Council, on the recommendation of the Judicial Committee upon any appeal, may remit the matter which shall be the subject of such appeal to the Court appealed from, to be there re-heard either generally or upon certain points only, and upon such re-hearing to take such additional evidence though before rejected, or reject such evidence before admitted, as his Majesty in Council should direct; and further, that on any such remitting

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and production
of documents
before Judicial
Committee, and
contempts and
punishments of
witnesses guilty
of perjury.

The modes of
examining wit-
nesses, &c.

The re-examin-
ation of wit-
nesses upon the
whole or part of
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Power to direct
a feigned issue.

(k) See 2 Knapp's Rep. Appendix, xxvii to xxix, at end of second part.

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and directions
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and evidence
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New trials.

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or otherwise, it should be lawful for his Majesty in Council to direct that one or more feigned issue or issues should be tried in any of his Majesty's dominions abroad, for any purpose for which such issue shall to his Majesty in Council seem proper.

The 10th section *extends* the power of directing and trying *feigned issues* by enacting, that the Judicial Committee may direct one or more *feigned issue* or issues to be tried in any Court of common law, and either at bar, or before a judge of assize, or at the sittings for the trial of issues in London or Middlesex, and either by a special or common jury, in like manner and for the same purpose as is now done by the Court of Chancery. The 11th section authorizes the Judicial Committee to direct, on the trial of any issue, that the deposition already taken of any witnesses, who shall have died or who shall be incapable of giving oral testimony, shall be received in evidence; and further, that such deeds, evidences, and writings shall be produced, and such facts shall be admitted, as to the said committee shall seem fit; and the 12th section enacts, that the said committee may make such and the like orders respecting the admission of persons, whether parties or others, to be examined as witnesses upon the trial of such issues as the Lord High Chancellor, or the Court of Chancery, has been used to make respecting the admission of witnesses upon the trial of issues directed by the Chancellor or the Court of Chancery; and the 13th section authorizes the committee to grant one or more *New Trials*, and that the evidence of witnesses previously examined shall be admissible, in case of death, mental disease, or infirmity. The power of examining witnesses on interrogatories is also extended to such issues by section 14. Upon this enactment as to feigned issues it has been observed, that before this act the King in Council, on any appeal from a Court of *Chancery*, had jurisdiction to order the trial of an issue in the country from which the appeal came; but that under the present act, the Judicial Committee have the power of directing issues not only in such cases but also on appeals from the *Ecclesiastical*, *Admiralty*, and *Prize* Courts, and from the Chancellor in *Lunacy*, and of ordering them to be tried either in England or in any of the colonies, at their discretion. (1)

The 15th section enacts that "*the costs* incurred in the prosecution of any appeal or matter referred to the said Judicial Committee, and of such issues as the same committee shall under that act direct, shall be paid by such party or parties, person or persons, and be taxed by the appointed registrar or

(1) 2 Knapp's Rep. viii. and ix. n. t.

such other person appointed by his Majesty in Council, or the said Judicial Committee *shall direct*." Upon which enactment it has been observed, that in all the colonial Courts leave to appeal is only granted on condition of the appellant's *giving security for the due prosecution* of his appeal, and for the payment of all such costs as may be awarded by his Majesty in Council to the respondents; and leave to appeal is seldom granted by the council except upon the same terms, and that perhaps the only exception is on the rare occurrence of a pauper appellant. (m) From the recent appeals to the Privy Council from India, brought to a hearing in pursuance of the above-mentioned order of council, it appears that from about 800*l.* to 1000*l.* were required to be paid into the Court in India, before leave to appeal to the King in Council is granted.

In the exercise of such discretionary jurisdiction over costs, the Judicial Committee, as might be supposed, are influenced by those general principles that ought to regulate all well constituted tribunals; and therefore, where the same points of law involved in the appeals had been previously determined, to the knowledge of the respondents, against them, and yet they, by not consenting to an amicable compromise, had put the appellants to unnecessary expense and forced them to appeal, costs were given to such appellants. (n)

The 16th section enacts "that the order or decrees of his Majesty in Council, made in pursuance of any recommendation of the said Judicial Committee, in any *matter of appeal* from the judgment or order of any Court or judge, shall be enrolled for safe custody in such manner, and the same may be inspected and copies thereof taken, under such regulations as his Majesty in Council shall direct." The practice appears to be against permitting a *rehearing*. (o)

The 21st section enacts "that the order or decree of his Majesty in Council, on any appeal from the order, sentence, or decree of any Court of justice in the East Indies, or of any colony, plantation, or other his Majesty's *dominions abroad*, shall be carried into effect in such manner and subject to such limitations and conditions as his Majesty in Council shall, on the recommendation of the Judicial Committee, direct, but pro-

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copies taken.

Decrees on ap-
peals from
abroad to be
enforced as his
Majesty in
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Committee
direct.

(m) 2 Knapp, xl. note *, where see further as to Costs. As to the security, *Camberton v. Egreignard*, 1 Knapp, R. 251; see *Henry v. Ryan*, *id.* 383; *Bertram v. Godfrey*, *id.* 381; *Craig v. Shand*, *id.* 253.

(n) *Nedham v. Simpson*, 2 Knapp's Rep. 1; and see *Henry v. Ryan*, 1 Knapp, 388.

(o) *Nedham v. Simpson*, 2 Knapp, R. 5 and 6.

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Existing powers of Chancery or King's Bench or Ecclesiastical Courts, in punishing contempts and compelling appearances and enforcing judgments, decrees, and orders, transferred and extended to Judicial Committee and to Privy Council.

Power of the King to appoint a registrar of Judicial Committee.

Regulates the right of the registrar of Court of Admiralty to attend.

Regulations in treaties preserved.

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vides that the act shall not in any respect abridge the powers of the whole Privy Council."

The 28th section enacts that the Judicial Committee shall enjoy all the powers of punishing contempts, and of compelling appearances, and his Majesty in Council shall have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders, as are now exercised by the Court of Chancery or King's Bench, (and both in *personam* and in *rem*,) or as are given to any Court *Ecclesiastical*, by an act passed in 2 & 3 W. 4, c. 93, (*p*) intituled an act for enforcing the process upon contempts in the Courts Ecclesiastical of England and Wales; and that all such powers as are given to Courts Ecclesiastical, if of *punishing contempts, or of compelling appearances*, shall be exercised by the said Judicial Committee; and if of enforcing *decrees and orders*, shall be exercised by his Majesty in Council, in the same manner as the powers in and by such act given, and shall be of as much force and effect as if the same had been expressly given to the said committee or to his Majesty in Council.

The 18th section authorizes his Majesty to appoint a *registrar* of the said Privy Council, as regards the purposes of that act, and to direct what duties shall be performed by such registrar.

The 29th section enacts that, subject to such orders as his Majesty in Council shall make, the then *present registrar* of the High Court of Admiralty, in person or by deputy, may attend the hearing by the said Judicial Committee of all causes and appeals, upon the hearing of which, if the act had not been passed, he would have had a right to attend by virtue of his offices of registrar of the High Courts of Admiralty, Delegates, and Appeals for Prizes.

The 31st section reserves the provisions in any treaty with any foreign potentate, in which it shall be stipulated that any person or persons other than the said Judicial Committee shall hear and finally adjudicate appeals from his Majesty's Courts of Admiralty in causes of prize.

By ORDERS IN COUNCIL of 9th December, 1833, (*q*) after reciting that it was expedient that certain rules and regulations should be made for the more convenient conducting of appeals and applications in *prize* suits, and in all *other suits* or proceedings in the said Courts of *Admiralty* or *Vice-Admiralty*, or

(*p*) Should have been noticed, *ante*, 485. (*q*) See 2 Knapp's Rep. xx. to xxiv.

any other Court in the plantations in America, and other his Majesty's dominions elsewhere abroad, which might formerly have been made to the High Court of Admiralty in England, or to the Lords Commissioners in prize causes respectively, as well as of such appeals, suits, or complaints in the nature of appeals from or in respect of the determination, sentence, rule, or order of any judge or judicial officer of any Ecclesiastical Court in England, or of the said High Court of Admiralty in England, which, by virtue of any law, statute, or custom, shall be made to his Majesty in Council; therefore, first, orders that all of them shall be conducted in the same manner and by the same persons as formerly; secondly, it is then ordered that four or more of the Judicial Committee may appoint surrogates of the Prerogative and Admiralty Courts, to act as surrogates of the Judicial Committee; thirdly, it is then ordered that the then present registrar of the Court of Admiralty shall attend on all appeals which would formerly have been heard by the Court of Delegates and Admiralty or Commissioners of Prize Appeals; and fourthly, that on entering an appeal in the Court of Admiralty and Appeals a petition shall be presented to the King in Council, which shall be transmitted to the registrar.

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'The order in council of 10th December, 1833, recites, the third of the last mentioned order in council, and then declares, that in pursuance of that authority, the several advocates of the Arches Court of Canterbury, and of the said High Court of Admiralty, who now are or hereafter shall be duly or legally admitted surrogates of such Courts, may by four or more members of the said Judicial Committee be admitted surrogates thereof for and in respect of such appeals, applications, suits or complaints in the nature of appeals as aforesaid, and for the purposes mentioned in the said order.

Order in
Council, 10
Dec. 1833.(r)

In a preceding page we have seen that the Chancellor, the Master of the Rolls, and the Vice-Chancellor have a right to send a case, stating facts, and a question of *law* thereupon, to a Court of *Law* for their opinions upon a point of law, though not upon a matter of trust, or an equitable question, or a mere abstract question, without the particular facts upon which the question has arisen. (s) But before the late act, it was decided that the Privy Council has no right to send a case to a Court of Law for its decision; (t) and constituted, as we have seen the

Other matters
relating to the
Privy Council
and the Judi-
cial Committee.

(r) See 2 Knapp's Rep. xxiv.

(s) *Ante*, 350 to 352.

(t) 1 Hen. Bla. 673; Douglas, 330,

where the Court of King's Bench refused to receive or answer a case from the Privy Council; and see 2 Knapp's R. ix. in note.

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Judicial Committee of the Privy Council now is under that act, of at least the Chief Justices of the King's Bench and Common Pleas, and Chief Baron of the Exchequer, there is less reason for requiring the advice or opinion of the judges of a common law court. (*t*)

In a recent case before this act, it appears to have been considered in the Privy Council that that Court will not exercise jurisdiction as a Court of Appeal from the decision of the Lords Commissioners of the Treasury, as to grants by the crown of property accruing to it by virtue of its prerogative; (*u*) but the 4th section of 3 & 4 W. 4, c. 41, appears now to enable his Majesty to refer to the Judicial Committee any such matters whatever as he shall think fit, and appears also to extend to such a case, so that his Majesty might require the Judicial Committee to consider and report to him their view of the course that should be adopted. (*x*) Upon a writ of error from the British West Indies, if it appear that the judge of the original Court inconsiderately signed an imperfect and incorrect bill of exceptions, a Court of Error in the same country ought to direct the bill of exceptions to be taken off the file and amended by the judge's notes, and the Privy Council here will direct that to be done. (*y*)

From the island of Guernsey, several of the inhabitants there may proceed by petition for leave to appeal from a decision of a Court there, confirming a rate for the relief of the poor, although separately and collectively they were rated in less than the sum fixed by the orders in council regulating appeals from that island, and prohibiting appeals where the sum in dispute is under a certain sum; such a case of small rates not being within the intent of the orders in council regulating appeals. (*z*) When the Privy Council has sent a reference to a Court below for them to certify as to a point of practice, their certificates cannot be disputed, unless a petition praying for a fresh reference is presented and supported by affidavit disputing the accuracy of the certificate. (*a*)

The course of proceedings in the Judicial Committee of the Privy Council.

The course of proceedings in the Judicial Committee of the Privy Council varies according to the country and Court from

(*t*) And see *ante*, 452, note (*p*), as to the equity side of the Court of Exchequer not stating such a case, because its own equity judges are also judges on the law side of the Court.

(*u*) *Army of the Dean*, 2 Knapp, R. 103.

(*x*) The above case was decided on the

9th and 10th of July, 1833, and the act 3 & 4 W. 4, c. 41, was passed on the 14th of August, 1833.

(*y*) *Pownall v. Mascall*, 2 Knapp, R. 161.

(*z*) *In re Tupper*, 2 Knapp, R. 201.

(*a*) *Quesne v. Nicolle*, 1 Knapp, R. 257.

which the appeal has taken place. From the East Indies, from which of late the appeals brought to an hearing have been numerous, a perfect *transcript* of the pleadings and proceedings in the local provincial Courts and foreign Courts of Appeal, with the interrogatories and examinations and testimony of all the witnesses, and the whole of the evidence, and the interlocutory and final decrees of the foreign Courts, in natural order of time, is sent over from abroad and is produced before the Judicial Committee, and each member, anxious to become master of the whole proceedings, may examine the same. But to facilitate research and a more ready attainment of the knowledge of the merits of each case, *cases* are usually prepared, as well on behalf of the appellant as of the respondent, shortly analyzing the pleadings and proceedings, and referring to the full transcript, and then stating arguments and reasons on each side, and drawing conclusions in favour of the party on whose behalf the statement is made. Both these cases are printed at length, and in due time, before the hearing, printed copies are laid before the members of the Judicial Committee, and on the appointed day, one, two, or more counsel are heard on behalf of the appellant and respondent; and when the Judicial Committee, or the majority, have formed their opinion, the same is reported by the presiding law lord in open court to the King in Council, who thereupon ultimately decides. It seems that the decision of the Judicial Committee, or rather of the King in Council, upon the report and recommendation of such committee, is final and conclusive and that no appeal lies from thence to the House of Lords.

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2. JUDICIAL
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3. *The House of Lords.*

3. HOUSE OF
LORDS.

1. General observations on the jurisdiction of the House of Lords, especially on its appellate jurisdiction.
2. From what Courts and proceedings a writ of Error or appeal is or is not sustainable.
 1. From Courts in England.
 1. Of law.

2. Of equity.
2. From Courts in Scotland.
3. From Courts in Ireland.
4. Not from Islands or other Foreign Courts.
3. The practice or course of proceedings on writs of Error and appeal.

Anciently and until within about a century, the House of Lords assumed and exercised *original* jurisdiction over civil suits and proceedings to a considerable extent, though it has been demonstrated that such assumption was unconstitutional. (b)

(b) 3 Bla. Com. 57 ; Palmer's Practice. House of Lords, Introd. iv. v. xxvii. xxxii. and authorities there collected.

The latter work will be found historically interesting and instructive.

1. General observations on the jurisdiction of the House of Lords and especially its appellate jurisdiction.

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With respect to *appellate jurisdiction*, although Lord Hale in his treatise 'on the jurisdiction of the Lords' denies it, yet his observations obviously merely present a learned conflict of authorities against long established practice, confirmed by numerous recitals and enactments. (c) Indeed it must be admitted to be of the utmost importance that *there should be a Supreme Court of Appeal*, by which the decisions of all inferior Courts in the kingdom may be reviewed and controlled; for without such a Court of appeal there would constantly be conflicting decisions on subjects exactly similar, but discussed and decided before different and independent tribunals, who would each in practice adhere to their own opinions on future occasions unless controlled by the highest Court of Appeal, whose decision, as settling the rule of law, would compel all inferior Courts afterwards to submit and conform. (d) The House of Lords is composed of the Lord Chancellor, certain law Lords, and the Lords Spiritual and Temporal. If, as advised by Sir Wm. Blackstone, *all the hereditary Lords of Parliament* (keeping in view the ultimate active exercise of their functions when by descent they would be required to sit in the House), would, in the course of their education, (in other respects in general admirably extensive,) study the general *principles* on which all the laws not only of *England* but of *Scotland* and *Ireland* are founded, in order to *qualify* themselves to exercise such their high judicial function, and if they would also, when members of that House, *laudably exert* sufficient *interest*, whether from due sense of duty or otherwise, *actually* to take part in the decisions of the House as a Court of Error and Appeal, then this august assembly would constitute the most efficient tribunal on earth; (e) because the House of Lords has not only the advantage of hearing the contending arguments of the most *eminent counsel*, excited by the occasion to the most acute and distinct examination of *each side* of the subject, but they also have and in difficult cases frequently exercise the privilege of convening before them all the *judges* and the highest law officers, and require each separately and seriatim to state his opinion upon all *legal* questions connected with the particular writ of error before the House. So that the spiritual

(c) See authorities, Palmer's Introd. xxxii.

(d) See a recent pamphlet attributed to Lord Redesdale.

(e) Sir Wm. Blackstone observes, that the reason and ground upon which the Lords are intrusted with their high appellate jurisdiction is, that the law reposes an entire confidence in the honour and conscience of the noble persons who compose

this important assembly, that (if possible) they will make themselves masters of those questions which they undertake to decide; and in all dubious cases refer themselves to the opinion of the judges, who are summoned by writ to advise them. See 3 Bla. Com. 57, 454, 455; 1 Bla. Com. 9, 10; and see Barrington's Observations on Statutes, 199; Palmer's Practice, Lords, Introd. xxxiii. 122 123.

and lay lords, before they are called upon to decide, may readily understand and appreciate all the possible reasons for or against a particular decision, and may thereupon exercise their own judgment, which, after their cultivated education and general attention to legal principles, they would then do with reasonable expectation of arriving at a just conclusion.

But unfortunately many, if not most, of the cases that are brought before the House of Lords are of a *technical* nature, and excite only the particular and private interests of the individuals concerned, and do not involve any great constitutional or legal principle; and therefore when they arrive at what is termed now almost ironically a "*hearing*," it too frequently happens that the House of Lords is actually reduced in number to its lowest limit of only *three Lords*; (f) and these are called upon to decide, not only on the legal merits of the unanimous decisions of the ten judges of the Court of Exchequer Chamber, but of the decrees of the Chancellor himself, and the decisions of all the judges of Scotland upon abstruse and difficult questions of their own local law, little known by English lawyers, and of the decisions of the judges in Ireland on their local law; and what is still more objectionable, it frequently occurs that the Lords who finally attend and *decide* upon the case, have not been present at or know half the arguments that have been urged pro and con. Such a tribunal is in practice obviously very inadequate and unsatisfactory, and indeed scarcely decorously conducted, and it is essential that *a new jurisdiction* should be constituted somewhat analogous to that of the Judicial Committee of the Privy Council, (g) but requiring the attendance of more than *four* of its members, who in that particular jurisdiction are declared competent to exercise its functions. (h) As it is probable, that some

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(f) Palmer's Practice, Lords, Introd. xl.

(g) 3 & 4 W. 4, c. 41, ante, 573 to 577.

(h) *Id.* sect. 5, ante, 574, 5. On Monday, the 14th August, 1834, the Lord High Chancellor Brougham laid before the House of Lords a bill for instituting such a Court, and made the following observations. "The manner in which appeals were heard involved a very serious grievance, both as regarded the judicial character of their lordships' house, and the interests of the suitors. When the first hearing of an appeal came on, two noble lords sat and assisted at the opening; two others attended the hearing on the other side. On the third day two noble lords, who had not been present before, came down and heard the reply.

The cause was then set down for judgment, and in the fourth instance two noble lords assisted at that judgment who had not heard the beginning, the middle, nor the end of the proceeding. Such a system was not in accordance with common decency either to noble lords who were thus called in rotation to assist in appeal cases, to the suitors whose interests were to be considered, or to the house itself. The anomaly of appealing to the Chancellor in that house, with reference to causes which he had previously decided elsewhere, had so often been stated on various occasions that he need not go into great length on that point. He had now been sitting for the greatest part of this session on Irish and English appeals, and he had been obliged to postpone for two sessions several

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material alteration will ere long be introduced in the constitution and course of proceedings in this Court of error and appeal,

of those causes, because they were appeals from his own judgment. He was anxious to obtain the assistance of Lord Plunkett or the Lord Chief Baron, but as he could not procure their valuable aid, he was compelled to hear those appeals himself. There were 14 or 15 appeals, in deciding which he wished to have that assistance, and of these, 10 or 11 were appeals from his own judgments. Now, he had not the least degree of bias in favour of any judgment that might have been given by himself, and if proper cause were shown, he would be ready to alter it. His affirming a judgment of his own in that house did not make the point right, if the decision were originally wrong. Professional men would see, and would mark the error. But what he looked to was this—that by affirming a judgment he gave it the force of law, and nothing but an act of Parliament could alter it. That being the case, he would ask whether it was proper that an appeal should lie to any one single judge? Whether, for the purpose of insuring a right decision, of commanding confidence in that decision, with reference to the suitor, the public, and the profession at large, and of obtaining uniformity in decision—whether, for the attainment of these great purposes, it was not absolutely necessary that a court of appeal, consisting of more persons than one, should be established? The law assumed that such a Court did exist. But because it made all their lordships hereditary judges of appeal, in common law cases they called in the judges; but in appeal cases, English, Scotch, and Irish, this was not the practice. The defect of the system might be proved by a single instance. Suppose a decision of the 13 judges of Scotland appealed against. It was taken from those persons, who understood the Scotch law, and was to be adjudicated by a single individual, who perhaps was as ignorant of the law of Scotland as of the law of Japan. Was it likely that his unassisted decision could give satisfaction? There was much truth in the homely proverb “Many heads are better than one.” This was clearly borne out by the entire success of the Judicial Committee of the Privy Council. The second case tried before them would have been decided the other way, if any one of those who formed the committee had considered it alone. But the judges laid their five heads together, and the consequence was a unanimous judgment directly contrary to that which any one of them unassisted would have pronounced. These were his reasons for desiring some modification of the existing law. He would now allude to the difficulties which he had to overcome in effecting any such modifications. The

first was the repugnance which he had naturally felt to alter the jurisdiction of their lordships, and the next was the small number of judges from whom he could select a certain number to hear appeals; for he held it to be indispensable that appeals should be decided by judges taken from other Courts, and not by judges appointed for the express purpose of deciding such cases, and forming a separate and exclusive tribunal. The example of France, where there were two Courts exclusively for hearing of appeals—namely, the Cour Royal and the Cour de Cassation—proved nothing, for there was such a vast number of inferior judges, that it would be almost impossible to call upon them to sit in appeal. He thought that judges who were only judges of appeal would not be fit for anything. What would he (the Lord Chancellor) be worth as a judge, if he sat forty or fifty days in the year to hear appeals only, without being accustomed to the forensic *strepitus*, as it were, and without having heard the business done in the first instance, which afterwards became the subject of appeal? There never would be a Court of Appeal worth any thing, unless the judges composing it sat also in the Courts below. On the other hand, it was necessary that the judges of the Court of Appeal should not be those whose decision was appealed against; and on the other, that they should be accustomed to preside in the Courts below. There was but one middle course to take, and that was judiciously to compose a due admixture of the various judges with those whose decisions were appealed against,—thus proceeding on the principle of analogy to the Courts of Common Law. When the Court of King's Bench, or the Court of Exchequer, or the Court of Common Pleas went wrong, an appeal was made to the other common law judges, and so when all these judges went wrong, an appeal took place to the House of Lords, which sent for the judges, who intermixed with the equity judges, and applied their minds to the subject. It was upon this principle that the Judicial Committee of the Privy Council was constructed, and upon the same principle he would proceed to the change he was about to propose; and as in the former case the royal prerogative was left untouched, so in the latter the jurisdiction of the House of Lords would remain unimpaired. The Judicial Committee of the Privy Council consisted of judges selected by rotation, of whom there were never less than four present. They decided the appeal, and reported their decision to the Privy Council, where judgment was given by the King

we will here introduce only a few observations that will, probably continue to be applicable notwithstanding such alterations.

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The House of Lords has not, strictly speaking, any *original* jurisdiction over *civil* disputes or causes, and, therefore, no original suit can be *commenced* before this tribunal.⁽ⁱ⁾ But the *appellate* jurisdiction of the House as well from the decision of superior Courts of *Law* (exercised by writ of error) as from the decrees and decisions of superior Courts of *Equity*, (exercised by petition and appeal,) is very extensive, (though confined to decisions within England, Wales, Scotland, and Ireland,)^(k) and may be considered, as it affects judgments, decrees, decisions, and proceedings, first, in *England*; secondly, in *Scotland*; thirdly, in *Ireland*; and fourthly, in *other* cases. But, first, it is necessary to advert to the *common law rule*, that if there be a fixed ascending scale of superiority affecting several Courts, an error in the judgment of the inferior Court must, in general, be examined and determined in the Court *next in order* in such ascending scale, and will not lie *per saltum*, as it is termed, to the highest tribunal; thus at common law, on a judgment of the Common Pleas, a writ of error did not lie directly to parliament, but to the King's Bench;^(l) and although we

2. From what Courts and proceedings, and in what order the House of Lords exercises an appellate jurisdiction in general.

in Council precisely as before. This, he repeated, was the principle upon which his bill proceeded. It would give their lordships the power of calling for the services of the judges in equity, and of directing any case in which an appeal might be resorted to to be tried by a Judicial Committee to be appointed under the bill. This Judicial Committee would pronounce its judgment in open Court, which would be reported to the house, and then the house would pronounce its judgment in open Court. The rights and dignity of their lordships' house would be preserved inviolate as heretofore. He proposed that the Judicial Committee should always have presiding over it either the Lord Chancellor for the time being, or the Chief Justice of the King's Bench; or a new officer, a Vice-President, without salary, to be appointed by the crown, and to hold rank next to the Privy Seal, and who must previously have filled the office of Lord Chancellor, or Lord Chief Justice of the King's Bench, or of the Common Pleas. The Vice-President, however, would only be called upon to act when the Lord Chancellor or the Chief Justice of the King's Bench might be prevented from presiding in consequence of being engaged elsewhere. Thus, then, the Judicial Committee of the House of Lords would consist of four judges,

who would be presided over by the actual or late Lord Chancellor, or the actual or late Chief Justice of the King's Bench, or of the Common Pleas. He wished it to be observed that no part of their lordships' jurisdiction would be taken away by the change which he proposed. Other suggestions and observations on the improvement of this tribunal will be found in Palmer's Prac. Lords, Introd. xlii.

(i) 3 Bla. Com. 37; Palmer's Prac. Lords, Introd. iv. v. xxvii. xxxii. A bill for a divorce from the bond of marriage, and so as to enable the parties to marry again, not being an *action* or *suit*, but a proceeding of a different nature, cannot be deemed an exception to such rule. There are certain orders and established practice in the House of Lords respecting bills for divorce, the principal of which are, that to sustain such a suit there must have been, first, a decree of divorce a mensa et thoro in the Spiritual Court; and secondly, a verdict or judgment by default, and the quantum of damages settled in an action in one of the superior Courts, and certain other rules of the House prescribed to prevent collusion. See *ante*, vol. i. 60, 61; 1 Newl. Chan. Pr. 370.

(k) 3 Bla. Com. 57.

(l) Hale's Juris. 123.

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have seen that this is now altered in one respect, and the writ of error from the judgment of Common Pleas, in an action commenced in that Court, must be returnable directly in the Exchequer Chamber, and not in King's Bench; yet it cannot be returnable immediately in the House of Lords.^(m) And in the case of Lord *Macclesfield*, who brought a writ of error from a judgment of the Court of Exchequer of Pleas returnable in Parliament, it was effectually objected that it came there *per saltum*, and ought to have gone first to the Exchequer Chamber, under the 31 Edw. 3;⁽ⁿ⁾ and although it is another maxim that the *multiplication of appeals* is not to be favoured,^(o) and the 1 W. 4, c. 70, s. 8, was probably in part enacted on that principle, yet (with the exception of the proceeding in a superior Ecclesiastical Court in the first instance by letters of request, and thereby ousting intermediate Courts of their jurisdiction,) that is an anomaly unknown in the common law, and to be established only by special enactment.

Another general rule is also here to be noticed, viz. that when there is a succession of Courts of Error, and it is known that one of the parties is resolved at all events to carry his case ultimately to the highest tribunal, yet it is considered to be incumbent on each inferior Court fully to discuss, and duly to deliberate before they give judgment, and not to decide hastily as of course *pro formâ*, which a late Lord Chancellor treated as highly condemnable and improper.^(p)

1. From what Courts and proceedings in England.

Error from Courts of law.
(q)

We will now proceed to consider more particularly from what Courts and proceedings a writ of error or appeal is or not sustainable, and *first*, as regards *England*, and herein, 1. as respects *Courts of Law*. We have seen, when considering the jurisdiction of the *Exchequer Chamber*, that writs of error to impeach the judgment of that Court must, by the express terms of the 1 W. 4, c. 70, s. 8, be returnable in the House of Lords, the enactment being, "from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament."^(r) But notwithstanding this act unquestionably extends to all judgments in error of the Court of Exchequer Chamber, yet there are still cases in which a writ of error lies *directly* from the King's Bench into the House of Lords, without the intervention of a

(m) *Ante*, 568, 569; 1 W. 4, c. 70, s. 8.

(n) 1 Ld. Raym. 15; Skin. R. 517; Palmer's Pr. Lords, 121, 127; 5 Bla. Com. 410.

(o) *Ante*, 497; 3 Phil. R. 255.

(p) Per Lord Eldon, Chancellor, in

House of Lords, pending discussions in *The King v. Woolf*, MS.

(q) See in general from what proceeding a writ of error returnable in Parliament lies, Palmer's Pr. Lords, 134 to 151.

(r) *Ante*, 568.

judgment in the Exchequer Chamber. Thus where there has been a judgment in King's Bench upon a writ of error from an *inferior Court of Record*, then a writ of error is still returnable directly into the House of Lords, because the 1 W. 4, c. 70, s. 8, only applies to judgments of the Courts of King's Bench, Common Pleas, and Exchequer, in actions which were *originally commenced* in one of those Courts, and to which the writ of error is directed, (s) although on *principle* there seems to be no reason why in the constitution of Courts of Error the propriety of all judgments whatsoever should not be inquired into and determined in the Exchequer Chamber before the inquiry, should be transferred to the House of Lords. So notwithstanding the statute 1 W. 4, c. 70, s. 8, if a writ of *false judgment* from the decision of an inferior Court, not of record, be returnable in the Common Pleas, and by the decision there becomes matter of record, and then a writ of error upon the latter judgment be returnable, as it clearly may, in King's Bench, then after judgment there must be a writ of error upon such latter judgment, returnable in the House of Lords, without the intervening tribunal of the Exchequer Chamber. (t) So if a judgment of the *Cinque Ports* be affirmed or reversed in King's Bench, a writ of error thereupon lies in the House of Lords. (u) And upon a judgment of King's Bench on a writ of error from the Petty Bag, it has been supposed that a writ of error lies directly after judgment in King's Bench to the Lords. (r) At all events it seems that the legal propriety of the decision of the most inferior Courts of Law in England, whether of record or not, may ultimately be investigated *as matter of right* in this highest tribunal; subject nevertheless, as we shall presently see, to the necessity for finding *bail*, and some other qualifications introduced only by express enactments. But in general the 1 W. 4, c. 70, s. 8, will apply to all judgments of King's Bench, Common Pleas, or Exchequer of Pleas, given in an action *commenced there*, and require the writ of error to be directed first into the Exchequer Chamber, and from thence to the Lords.

It seems scarcely necessary to observe, that a writ of error can only be sustained on account of some *intrinsic* objection apparent on the face of the record, as either in the pleadings (x) or *continuances*, or the *judgment* itself, or in respect of objec-

(s) *Ricketts v. Lewis*, 2 Crompt. & J. 11.

(t) Rol. Ab. 744; Bac. Ab. Error: *Palmer's Pr. Lords*, 135; and see *Ricketts v. Lewis*, 2 Crompt. & J. 11.

(u) *Palmer's Pr. Lords*, 136.

(v) *Id.* 138.

(r) *Palmer's Pr. Lords*, 130; 3 Bla. Com. 378.

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tions appearing upon a *demurrer to evidence*, *bill of exceptions*, or *special verdict*, either annexed to or directly forming part of the proceedings; and in order to succeed in the Court of Error, the objection must be of so *substantial* a nature as not to be aided either at common law or by any statute of amendment or jeofail. (y) The mistatement of the plaintiff's case, or of the ground of the defence in the *pleadings*, the *misdirection of the judge* on the trial, or the *mistaken verdict* of a jury, can in no case form the subject of objection or inquiry in a Court of Error, unless in the instances above pointed out. Nor can decisions of the superior Courts upon *special cases* be investigated in a Court of Error, because neither the *facts* therein stated, nor the decision of the Court as respects *them*, ever form part of the record or transcript, which is sent to the Court of Error; (z) unless in consequence of leave reserved for that purpose, the facts of the special case be turned, as is the technical expression, into a special verdict, for the very purpose of taking the opinion of a Court of Error upon their effect. It is also an established rule, that a writ of error is not sustainable from or in respect of a rule or order, or interlocutory proceeding of a Court, or of a single judge on a *motion* or *summons* or otherwise, or relating to the intermediate stages of proceedings in an action; (a) nor as regards the rules or practice of a Court, or granting or refusing leave to plead double, or granting a new trial; the observations of Chief Justice Tindal, before noticed, are a clear exposition of the law on this subject. (b)

So no writ of error is sustainable in respect of an award, even though made a rule of Court; nor in any case where by actual or supposed legal authority the Court has erroneously acted in a summary way; nor in cases of contempt; nor in settlement cases removed into the King's Bench from the sessions; nor from decisions under the Annuity Acts. (c) And although the Court of King's Bench, we have seen, may examine these and many other proceedings *summarily* or by *certiorari*, and decide upon the proceedings of the inferior tribunal thereby brought before them, yet in these cases, and in all those where an inferior Court, as the Court of Requests, has been empowered to proceed in a method different from that observed in Courts of common law, the propriety of their judgment or proceeding cannot be the subject of a writ of

(y) *Lyme Regis v. Henley*, 1 Bing. New Cas. 259.

(z) 3 Bla. Com. 378; *Palmer's Pr. Lords*, 130

(a) *Palmer's Pr. Lords*, 140.

(b) *Ante*, 574, 575, and *id. n. (k)*.

(c) *Palmer's Pr. Lords*, 140.

error.(c) And in the superior Courts, when a *judgment is arrested*, there being no entry of a judgment, "*ideo consideratum est, &c.*" consequently no writ of error lies; but if the decision be incorrect, the plaintiff can only proceed *de novo*.(d) It is also established, that when a bill of exceptions is returned to a Court of Error, the counsel arguing in the latter Court is confined entirely to the matter expressly excepted to, and cannot argue upon other facts however apparent on the face of such bill.(e) Nor will the House of Lords receive from the agent of the plaintiff in error, a petition to refer to the judges the legal points in the case.(f) The observations as regards writs of error in the Exchequer Chamber, are in this respect equally applicable to a writ of error returnable in the House of Lords.

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With respect to writs of error *in fact*, as upon the ground of the *infancy* or *coverture* of the defendant, or of *death* before verdict, it has been the general opinion that they are in no case sustainable either in the Exchequer Chamber or in the House of Lords.(g) But it seems questionable whether exceptions do not exist, so that such an objection might be advanced upon a writ of error, returnable in the House of Lords, (g) and tried by transmitting the proceeding as regards the fact to the last preceding Court that had jurisdiction to convene and try a fact by jury.(h)

So there are some Courts of *Law* in England, from which no writ of error lies, because another remedy has been afforded, as from the Court of the Stannaries of the Duchy of Cornwall, for matters touching the Stannaries, there being an appeal to the Warden of the Stannaries, and from him to the Privy Council of the Prince of Wales, as Duke of Cornwall; and if there be no Prince of Wales, then to the King in Council.(i)

Secondly, From Courts of Equity. In general, from Courts of *Equity* in England, instead of a writ of *error*, (which issues only to remove the proceedings and judgments of Courts of *Law*,) the mode of appeal is by *petition for leave to Appeal*, and

2. From Courts of Equity.

(c) 1 Salk. 144, 263. As in the instance of decisions in Courts of Request, whose judgment is not founded on formal pleadings.

(d) Palmer's Pr. Lords, 141, 142.

(e) *Lucas v. Nicholls*, cited in *Wright v. Tatham*, 1 Adol. & Ellis's R. 15; *ante*, 574, note 9, and 577, 578; and see *Frankland v. M'Gusty*, 1 Knapp's Rep. 274, S. P.; *post*, 602, n. (t).

(f) *Rickets v. Lewis*, 1 Bing. New Cases, 196.

(g) *Ante*, 570; and see 1 Archbold's

Pract. K. B. by T. Chitty, §30.

(h) Palmer's Pract. Lords, 142 to 144; 159, 149, 151, 152, 154, 158; Rol. Ab. 746; Comyn's Rep. 597; 3 Salk. 146. In Palmer's Pract. Lords, 144, Lord Hale's Juris. 152, 153, is referred to, and it seems clear that an issue in fact might be joined in the Lords, and the record thereupon remitted to the next subordinate Court having jurisdiction to award jury process and try a question of fact.

(i) 4 Inst. 230; 3 Bla. C. 77; Palmer's Pract. Lords, 141.

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by *Appeal*, thereupon to the House of Lords. *(i)* And the origin, necessity for, and history of which jurisdiction is concisely stated by Sir William Blackstone. *(k)* It is said that appeals to the House of Lords from the Court of Chancery were first introduced in A.D. 1581. *(l)* This is the mode of obtaining an investigation of the decrees and final proceedings of the Chancellor, Master of the Rolls, Vice-Chancellor, and equity side of the Court of Exchequer, and from all the Courts of *Equity* in England and Wales; *(m)* and Blackstone observes, that from decrees of the Chancellor, relating to the commissioners for the dissolution of chauntries, &c., under the 37 H. 8, c. 4, as well as for charitable uses, under the statute 43 Eliz. c. 4, an appeal to the King in Parliament was always unquestionably allowed. *(n)*

But no appeal lies to the House of Lords from an *order* of the Chancellor in matters of *idiotcy* or *lunacy*, there being, as we have seen, a distinction between the jurisdiction of the *Court of Chancery* and the power of the Chancellor, and in these cases the proper course is to appeal to the King in Council; *(o)* or, as we have seen, after the death of the lunatic a bill in Chancery must be filed. *(p)* And it should seem that from the decision of the Vice-Chancellor of Lancaster the appeal is to the Chancellor of the Duchy Court at Westminster. *(q)*

So before the recent Bankruptcy Act, 1 & 2 W. 4, c. 56, s. 37, *(r)* there was no appeal to the Lords from an order of the Chancellor in matters of *bankruptcy*; *(s)* but now an appeal to the Lords in certain cases is given. *(t)* But no appeal to the *Lords* is sustainable from the decision of an *Ecclesiastical* or *Maritime* or *Prize* Court in England, nor from any *Court Martial*, nor from the decision of *any foreign Court*, even of the British *islands* of Man, Jersey, Guernsey, Sark or Alderney, or from the *colonies*. All appeals from those islands and colonies must be to the Privy Council, and from a Court Martial to the King in person. *(u)* It should seem also that the proceeding appealed from to the Lords must have been a *final decree* or *decision*, or of that nature, and not merely an order or interlocutory proceeding. *(v)* And where a decree has been

(i) 3 Bla. Com. 454; Palmer's Prac. Lords, 2, &c.

(k) *Id. ib.* and p. 57.

(l) Palmer's Prac. Lords, 276, *Introd.* ii.

(m) Palmer's Prac. Lords; 2 Bla. Com. 104; 3 Bla. Com. 454; Smith's Procedure in House of Lords, i. 109.

(n) 3 Bla. Com. 455; Duke's Charitable Uses, 62.

(o) Lord's Journ. 14th Feb. 1726; 3

P. Wms. 108; 6 Brown's Cas. Parl. 329.

(p) *Ante*; Grosvenor v. Drax, 2 Knapp's Rep. 82.

(q) 5 Ves. 725; 1 Vern. 442; Palmer, 276.

(r) *Ante*, 550.

(s) Palmer's Prac. Lords, 2, 3.

(t) *Ante*, 550.

(u) Palmer's Prac. Lords, 3; 3 Bla. Com. 68; Erskine's Inst. 54.

(v) Palmer's Prac. Lords, 4, 5.

made, with consent of counsel, it has been considered that like a reference and award with such consent, it will be binding and cannot be appealed against; (x) and it has been doubted whether an appeal is sustainable merely in respect of an improper decree relating to *costs*. (y)

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Under the Act of Union, 6 Ann. c. 26, s. 12, writs of *Error* from judgments on the *law* side of the Court of Exchequer in Scotland may be issued returnable in the House of Lords in England, and may be obtained on a *certificate* of counsel that in his opinion there is real error, and thereupon obtaining the attorney-general's *fiat*. (z) And under the same Act of Union an *appeal* lies from the decision of any Court of *Equity* in Scotland. Appeals from judgments or decrees in *Scotland* have, by 48 G. 3, c. 151, been limited to judgments or decrees on the *whole merits*, except only with the leave of the division of the judges, pronouncing an *interlocutory* judgment or decree, or where there was a difference of opinion amongst the judges thereof, nor shall any appeal be allowed from interlocutors, or decrees of Lords Ordinary, which have not been reviewed by the judges sitting in the division to which such Lords Ordinary belong. The acts 53 G. 3, c. 42; 59 G. 3, c. 3; 4 G. 4, c. 85, also contain further regulations respecting appeals from Scotland to the House of Lords, the operation of which will be fully stated, when we examine the whole practice in error. (a) No appeal lies from the Exchequer in Scotland as a Court of Revenue. (b) It has been justly suggested that it would be desirable that some of the Scotch judges, or some distinguished personages who had presided in that character, formed part of the tribunal when the House of Lords hear appeals from Scotland; for it is scarcely necessary to observe that those who pronounce judgment on appeal from that country should be fully acquainted with its laws. (c)

Before the Union, writs of error and appeals from the Irish Courts to the English House of Lords were the subjects of con-

Sdly, From
Courts in Ire-
land.

(x) Palmer's Prac. Lords, 3, where see conflicting cases.

(y) *Id.* 5, 6.; 1 Dow's Cas. Parl. 270.

(z) Palmer's Prac. Lords, 138, 242 to 247; Introduction, xlv. to lvi.

(d) See also Palmer's Prac. Lords, Introd. xlv. to lvi.

(b) Lord's Journal, vol. xxxix. 394; Palmer's Prac. Lords, 4.

(c) Palmer's Prac. Lords, Introd. xliii. After considerable practice and frequent explanations of the Scotch laws, I have found them less accessible, and less known or understood by Englishmen, even lawyers, than even the French Code, and yet those laws highly deserve study, as replete with sound principle.

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siderable discussion and hostility. The statute 6 G. 1, c. 5, took away the power of the Irish House of Lords as a Court of Appeal; but that enactment excited so much dissatisfaction, as derogatory to the Irish independence, that it was found necessary to repeal that act by 23 G. 3, c. 28, which took away the power of appeal from any Irish Court to the English House of Lords. (d) But at length the Act of Union, 39 & 40 G. 3, c. 67, article 8, (like the Scotch Union Act,) expressly directs that writs of *error* and *appeals* shall be finally decided by the House of Lords of the United Kingdom, except appeals from the *Instance* Court of Admiralty in Ireland, which were directed to be decided by the Delegates; (e) and are now to be discussed and reported by the Judicial Committee of the Privy Council to the King in Council. It is clear therefore that from the decisions of the twelve judges in Ireland, as a Court of Law, a writ of error is returnable in the House of Lords. (f)

4thly. In other cases; and whether from any other Court out of England.

It seems to be settled that from the judgment or decision of no Court out of the United Kingdom can a *writ of error* or petition or appeal in parliament be *returnable*, but that if there be any remedy, it is in the *Privy Council*, and be now discussed before the Judicial Committee. Thus from the Courts of the islands of Man, Guernsey, Jersey, Sark and Alderney, or in the colonies or settlements in America, Asia or Africa, or from the Courts in the East or West Indies, or from decisions in maritime or prize causes, no writ of error or appeal lies to the House of Lords; (g) but the proceeding for redress can only be by appeal to the King in Council. And though it is said that the acts of assembly, establishing Courts of Law in the islands of St. Christopher and Nevis, reserve the jurisdiction of the King's Bench in England; (h) yet there is no instance of the exercise of any appellate jurisdiction either by the Court of King's Bench or the House of Lords.

3dly. The course of proceedings in error, or on appeal in the House of Lords in general.

The Course of Proceeding. The mode of obtaining the interposition of this Supreme Court is by *writ of error* from a Court of *Common Law*, and by *petition* in the nature of an *appeal* from a Court of Equity. The principal differences between the two proceedings are; first, that a writ of error can only be brought upon a final and definitive judgment, whereas an appeal may be brought from an interlocutory order as well

(d) Palmer's Prac. Lords, lvi. to lviii.

(e) *Id.* 247, 351.

(f) *Id.* 138.

(g) *Id.* 3, 141, Introd. ii.

(h) *Id.* *ib.*

as from a final decree or sentence. The reason for allowing which appeals from intermediate orders in equity is stated to be that they often decide the merits of a case, and that the permitting of an appeal, in an early stage of the proceedings, frequently saves the expense, which is often very considerable, of prosecuting a suit further. (i) Secondly, on writs of error the Lords uniformly pronounce the judgment; and the same practice now prevails as regards appeals; (k) though formerly, it is said, they gave directions to the Court below to rectify, and in what respect its own decisions. (l) It has been observed, that owing to various causes, but chiefly to the acts of Union taking away appeals to the Scotch and Irish House of Lords, the number of *appeals* to the Lords has greatly increased, so as to exceed by far the *writs of error*.

A writ of error is a writ in the nature of a commission, and which issues out of Chancery, at the instance of a party who thinks himself aggrieved by an erroneous judgment of a *Court of Law and of Record*, authorizing a superior Court to examine the proceedings, and thereupon to affirm or reverse the judgment *according to law*. (m) The statute 10 & 11 W. 3, c. 4, requires the writ to be issued within twenty years after judgment signed or entered of record. (n) A writ of error in *civil* cases is a writ of right, though restrained by the regulations requiring bail, so as ultimately to secure the satisfaction of the sum recovered, with the costs in error. As the subject has a right to issue it without any other qualification than such bail and limit as to time, there is not, (as in the case of *appeals* from decrees of a Court of *Equity*,) any occasion for the *bonâ fide* opinion of counsel that there is ground of error, and it is only in criminal cases that the attorney-general's *fiat* is required, and though there is a warrant for the writ of error from the crown, it is quite of course. (o) The writ having been obtained is taken to the proper officer, whose duty it is to allow it, of which he gives a certificate, and to prepare a transcript of the whole record and proceedings for the Lords. The 6 G. 4, c. 96, in almost all cases of writs of error upon judgments, whether after verdict, or by default or otherwise, in any *personal* action, requires *bail* to enter into a *recognizance*, in sub-

Course of proceedings on a writ of error in civil cases.

(i) Palmer, *Prac. Lords*, 1.

(k) Palmer's *Prac. Lords*, 276; but see *ibid* p. 1.

(l) 3 Bla. Com. 56, 57, 454.

(m) Stra. 607.

(n) Palmer's *Prac. Lords*, 147. The

statute must be *pleaded*, R. T. Hardw.

345. Only five years are allowed for appeal. Palmer's *Prac. Lords*, *Introd.* lxviii.

(o) Palmer, 180.

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stance resembling that required by 3 Jac. 1, c. 8, viz. in double the sum adjudged to be recovered, conditioned to prosecute the writ of error with effect, and to satisfy and pay, if the judgment be affirmed, the debt, damages and costs thereby adjudged to be paid, and also all *costs* and damages to be also awarded for the delay of execution. (*p*) The subsequent practice and proceedings in error will hereafter be fully stated, and we shall here merely notice a few points which are most important.

The standing order of 19th April, 1698, appears to apply to writs of error as well as appeals, and directs that no person do presume to deliver any printed case to any Lord of the House, unless the same be *signed* by one or more counsel who attended at the hearing of the cause in the Court below, or shall be of counsel at the hearing in this house, (*q*) and the printed cases are to be delivered to the clerk in parliament, ready to be distributed at least four days before the hearing. (*r*) The order of 2d March, 1727, regulates the proceedings on the hearing of a writ of error or appeal, and directs that one of the counsel of the appellant shall open the case; then the evidence for the appellant shall be read, and then the other counsel for the appellant may observe on the evidence; this closes the appellant's case. Then one of the counsel for the respondent states his case, and the evidence is thereupon read, after which the other counsel for the respondent may make observations on such evidence. And one counsel only for the appellant is finally heard in reply. (*s*)

The Lords have a right to require the attendance in the House of the judges and high officers of the law. (*t*) They are generally summoned to attend the *hearing of writs of error*, though seldom on appeals, and they usually take some days to give their opinions. (*u*) But it is only in cases of real difficulty that the attendance of the judges is in practice required, for if they were constantly in attendance on hearing all the writs of error discussed in the House of Lords, the performance of their ordinary duties would be materially impeded. (*x*) The judges can, however, merely be required to state their opinions upon the *existing* common law or construction of a statute already enacted, and cannot be required to state their opinions upon an equitable question foreign to their department, (*y*) and still less can they be required to answer a speculative pro-

(*p*) It is observed that even the agent's costs of error in parliament frequently exceed 400*l*. Palmer's Prac. Lords, xliii.

(*q*) Palmer, 91.

(*r*) Order, 12 Jan. 1724.

(*s*) Palmer, 96.

(*t*) Palmer's Prac. Lords, Introd. vi.

(*u*) *Id.* p. 225.

(*x*) *Id.* 356, 357; Introd. xl, xlii.

(*y*) *Semble*, ante, 351; and see Bac. Ab. tit. Habeas Corpus, long note.

spective question; and recently the judges declined answering a question touching the operation of a proposed enactment which it had been suggested would interfere with the exclusive banking privileges of the Bank of England. (x) When the judges are prepared, and at an appointed time, they together attend the House, and it seems to have been the proper practice that the Chancellor, or some other law lord next in rank and experience, should also attend to receive and hear such opinions, so as to be prepared more efficiently to state the result to the spiritual and temporal law lords present, who are not supposed to be so conversant with legal rules as law lords; and on a late occasion the non-attendance of any law lord was objected to as irregular and objectionable, and Lord Eldon referred to a case in which a Lord Chancellor, after hearing the opinions of the twelve judges on a particular point, satisfied their lordships that the judges were wrong, and that their opinions could not be acted upon. (a) Sometimes on these occasions each judge separately states his opinion on each question, but when all the judges are unanimous, then one judge delivers the opinion of the whole. The opinion of the judge is not by any means binding on the House of Lords, any more than is the opinion of the Court of King's Bench on a case stated to them obligatory on the Chancellor; (b) but the unanimous opinion of the judges will in general influence the result. (c) Where, however, a statute has been erroneously construed by the ordinary Courts of Law, even in a long series of decisions, this is an instance in which peculiarly the House of Lords may decide according to the spirit of the enactment. (d)

The Lords do not confine themselves to any certain rule respecting costs, but give large or small or no costs to the defendant in error, as they think fit, upon affirming a judgment in his favour. They usually give 100*l.*, and seldom more than 150*l.*, although on one occasion they gave 400*l.* costs upon an affirmance, (e) and in another case 350*l.* costs, because there were a current of decisions on the point. (f) In all cases, as there is no officer of the house to tax the costs, their Lordships themselves always fix the amount, giving a round sum. (g)

(x) *In matter of London and Westminster Bank*, 1 Bing. New Cases, 197. But see several questions stated to the judges respecting a bill before parliament, and answered by them in Bacon's Ab. tit. *Habens Corpus*.

(a) See Report of Lord Eldon's observations and proceeding thereon fully, Times newspaper, 21 June, A.D. 1834, House of Lords.

(b) *Ante*, 351, 352, and *Reeve v. Long*,

1 Salk. 227; *Bishop of London v. Flytche*, Cunn. Law, Simony, 2 Bla. Com. 280.

(c) *Palmer's Prac. Lords*, Introd. xl., 356, 357.

(d) *Ibid.* 357.

(e) The recognizance on an appeal is limited to that sum.

(f) *Solarte v. Palmer*, 1 Bing. New Cases, 194.

(g) *Palmer's Prac. Lords*, 169.

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The practice.

In practice, to obtain a writ of error, returnable in Parliament, the attorney makes out on a slip of paper what is termed a *præcipe*, or instructions for the writ of error, which is taken to the cursitor's office, where the proper officer makes out the writ, and as of course grants a warrant from the crown. (g) The writ of error is then taken to the office of the clerk of the errors and *allowed* by him, and he grants a certificate of his allowance, which is served upon the attorney for the defendant in error, the original allowance being at the same time shown to him.

The obtaining of the allowance of the writ suspends execution and all other proceedings on behalf of the defendant in error, and such service of the certificate of allowance giving notice would subject the defendant in error and his attorney to a contempt, if he should afterwards attempt to proceed on the judgment. The next step is to put in bail, now required in almost every case; this must be done within four days from the delivery of the writ of error to the clerk of the errors, being the time when he should allow the same. To put in bail in error instructions are written for the clerk of the errors, stating the names, places of abode, and profession of the bail, and the named persons enter into a *recognizance* in error, in double the sum adjudged to be recovered by the former judgment, conditioned for the plaintiff in error prosecuting the writ of error with effect, and if judgment be affirmed, to satisfy and pay the damages and costs (or debt, damages and costs) recovered, together with such costs and damages as shall be awarded by occasion of the delay of execution, or else that the bail will do it for him. Notice of such bail having been put in should be immediately served on the attorney for the defendant in error, and unless the bail be excepted or objected to in twenty days after such notice, they are to stand allowed. If the bail be objected to, then a rule for better bail is obtained by the attorney of the defendant in error from the clerk of the errors, and a copy of such rule is to be served on the attorney for the plaintiff in error, and then usually the same bail justify, and if they satisfactorily swear to their sufficiency, they are allowed, and a note for their allowance is to be drawn up, and a copy served on the attorney for the defendant in error.

Thereupon a *rule for transcribing* the record is to be obtained by the attorney for the defendant in error from the office of the clerk of errors in Serjeants' Inn, and thereupon the proceedings in error take place as will hereafter be fully detailed.

An *Appeal* can only be from a *decision*, although it may be founded not only upon a *decree*, but upon an *order absolute*, in which respect appeals in equity differ as we have seen from proceedings at law, where there must have been a *final judgment*.^(h) If from a decree, then the decree itself must in all cases have been *signed* by the Chancellor,⁽ⁱ⁾ and although a cause has been heard before the Master of the Rolls or Vice-Chancellor, or Judges sitting for the Chancellor, yet the decree is considered as the Chancellor's and must be signed by him.^(k) From decrees of the Master of the Rolls or Vice-Chancellor, there may be an appeal either direct to the House of Lords or to the Chancellor, but it is not usual to appeal to the Lords in the first instance, unless the decree has been signed and enrolled, in which case the appeal may be directly to the Lords, and cannot then, it is said, be reheard before the Chancellor.^(l) Of late the Chancellor has frequently recommended an appeal direct from the decree of the Master of the Rolls or Vice-Chancellor to the Lords; and it seems that such direct appeal lies notwithstanding there has been a rehearing by the Master of the Rolls.^(m)

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The course of
proceedings on
appeals.

Petitions of *Appeal* are limited *in time*, and must be presented within *five years*, and a recognizance in 400*l.* is required for securing costs.⁽ⁿ⁾

As respects *parties*, it is a general rule that an appeal can only be brought by a party in the original suit, and that therefore a third person, who has not been such party below, will not be allowed to interfere by petition of appeal;^(o) but if it appear that such a person *ought* originally to have been made a party, the Lords will send the cause back for that purpose.^(p)

On appeal from decrees or proceedings in equity, whether of English, Scotch, or Irish Courts, the House of Lords does not, in practice, convene or obtain the assistance of the judges,^(q) because the judges of the Courts of Law do not assume to be practically acquainted with equitable doctrines or rules; as however the Chancellor, Master of the Rolls, or Vice-Chancellor

(h) 4 Brown's Parl. Cases, 367, 368. Palmer, 7; *ante*, 596, 597.

(i) 4 Brown's Parl. C. 198; Palmer, 7.

(k) 3 Bla. C. 453; Col. Cas. P. 238; Gill. His. Chan. 190; Palmer, 7, *ante*, 447, 448.

(l) Palmer, 7, 8; 3 Bla. C. 454.

(m) 8 Ves. 566; Palmer, 8.

(n) Palmer's Prac. Lords, lxviii, 12, 26; and see there standing order of Lords,

24th March, 1725.

(o) Palmer, 6. We have seen that *intervention* is a proceeding in general confined to the Ecclesiastical Courts, *ante*, 492, 493.

(p) Holle's Cases in Parliament, 127; Palmer, 6, 7.

(q) Per Lord Chancellor Brougham, *ante*, 598, note (n).

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may, on a case stated, obtain the opinion of the judges of a Court of Law, so as to enable them the better to decide upon matter of equity, it should seem that if it be expected that on hearing an appeal a difficult question of *law* will arise, then the House may require the attendance and opinion of the judges as regards that particular question.

Although on proceedings in the nature of appeal from an inferior Court, not of record, as from a conviction of justices of the peace to the sessions, or an appeal from a rate, fresh evidence is constantly received, and the facts are entirely re-investigated ;(r) it is otherwise on appeals from the decrees or decisions of Courts of Equity, whether in England or Scotland, in which case *no new evidence* is to be read or insisted upon. (s) And in Scotch appeals it is a rule of the House not to hear even *arguments* upon grounds not noticed in the Court below, (t) which practice is analogous to that of not hearing points arising upon the face of a bill of exceptions, unless they were formally raised and tendered to the judge on the trial. (u) But if the evidence has been rejected in the Court below, and such rejection there expressly objected to, then the same may be discussed in the Lords. (v)

Sir William Blackstone observes, that upon *appeals* to the House of Lords, their lordships gave directions to the Court below to rectify its own decree; but the present practice is otherwise: for the lords themselves reverse or vary erroneous decrees by their own order, and do not adopt the indelicate course attributed to them. It is true, however, that the lords may, and sometimes do, give directions to the inferior Court as to *future* proceedings. (x)

As to *costs*, the House of Lords has, it should seem, a discretionary jurisdiction, like that of a Court of Equity, so as not to be governed merely by the result, and very frequently much less than the actual costs are obtained, so as not too much to encourage appeals. (y) And when a judgment or decree is reversed, it is to be recollected that although the defendant in error may have been to blame in pressing for or relying upon the erroneous decision of the inferior tribunal, yet that *tribunal* principally occasioned the increased expense. It will be ob-

(r) *R. v. Commissioners of Excise*, 3 Maule & Sel. 133; *R. v. Jeffery*, 1 B. & C. 654; *ante*, this volume, 218.

(s) Palmer, 8; 3 Bla. C. 455; 1 Dow's Rep. 324.

(t) 1 Dow's Rep. 324; 2 Dow, 72; Palmer, 8.

(u) *Ante*, 593, n. (c).

(v) Palmer, 8.

(x) Palmer Prac. L. 276; but see *ibid.* page 1, referring to 3 Bla. Com. 56, 57, 454.

(y) Palmer, 171.

served that by the terms of the recognizance, presently noticed, it is limited to £400.

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on appeals.

The first step is a *notice* of appeal, (s) next a *petition* of appeal, constituting the appeal itself. (a) The order of the 3d March, 1697, requires the appeal to be signed by two counsel who have been counsel in the cause below, or shall attend as counsel at the bar of the House when the appeal is heard, and such counsel must certify that in their judgment there is reasonable cause of appeal, as thus, "We humbly certify that in our judgment there is reasonable cause of appeal in this case." (b) And in Scotch appeals the order of 1812 requires a peculiar form of certificate, stating either that leave was given by the Division Court pronouncing judgment to appeal, or that there was a difference of opinion among the judges of such division, pronouncing such interlocutory judgment. (c) It would be highly censurable if counsel should certify in favour of an appeal without due consideration, and bona fide entertaining the opinion that he subscribes; and on the 23d of March, 1715, a counsel was reprimanded on his knees by the House of Lords for disobeying the above mentioned order of the 3d of March, 1697, made to prevent the bringing of frivolous appeals. (d)

The appeal having been duly engrossed, is then taken to the parliament office, in order that it may be presented, but none of the proceedings in the Lords are upon stamped paper or parchment. (e)

The petition of appeal must be presented to the House by one of the lords. An order of summons to answer is then issued, and served upon the respondent, and afterwards an affidavit of same is made, and the appellant or his London agent, or other person, must, within eight days after his appeal has been lodged, enter into a recognizance in £400 conditioned for payment of such costs as this Court shall appoint, in case the decree appealed from shall be affirmed, and, as required by the standing orders of the 17th of July, 1710. (f) It has been justly objected, that improvidently there has not been any provision requiring the party entering into the recognizance

(s) See form, Palmer, 16.

(a) See form, Palmer, 17.

(b) Palmer, 16, 18.

(c) Palmer, 18.

(d) Palmer, Pr. Lords, 276. In Lords' Journal, 2d June, 1768, it appears that

an agent was taken into custody for putting a counsel's name to a case, Palmer, 53.

(e) Palmer, 24.

(f) Palmer, 22 to 27.

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to justify or shew that he is possessed of £400 after payment of his own debts; (g) and the practice seems even more defective in this respect than that of the Ecclesiastical Courts, in granting letters of administration, in which case we have seen that sureties may be required to justify, though not to state the particulars of their property. (h) This may suffice for an outline of the proceedings in this high Court of judicature; the full practice will be minutely stated in a distinct chapter closing this work.

(g) Palmer, 28.

(h) *Ante*, 502, 503.

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